(1)

No. 06-

IN THE

Supreme Court of the United States

JTEKT CORPORATION (F/K/A/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A., NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court is required to remand an administrative decision to an agency, when the agency decision under review was based on a policy that the agency has since reversed or modified in a highly analogous context; and

2. Whether a federal court is required to remand an administrative decision to an agency, when the agency action has been found to violate the United States' treaty obligations and the agency is the only body statutorily authorized to consider whether and how to implement the treaty.

PARTIES TO THE PROCEEDING

Petitioner Koyo Corporation of U.S.A. is a wholly-owned subsidiary of Petitioner Koyo Seiko Co., Ltd., which is now known as JTEKT Corporation. JTEKT Corporation is a publicly-owned company with shares listed on the Tokyo Stock Exchange. Toyota Motor Corporation, a publicly-owned company with shares listed on the Tokyo, New York, and London Stock Exchanges, owns more than 10% of the shares of JTEKT Corporation.

Petitioners NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation are wholly-owned subsidiaries of NTN USA Corporation, which is a wholly-owned subsidiary of Petitioner NTN Corporation, a publicly-owned company with shares listed on the Tokyo Stock Exchange.

Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Koyo Seiko Company, Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"),[1] and NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation (collectively "NTN") respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals is available at 210 F. App'x 992 (Fed. Cir. 2006), Pet. App. 1a-2a. The order of the court of appeals denying the petition for rehearing is unreported, but is available at 2007 U.S. App. LEXIS 4456 (Fed. Cir. Feb. 6, 2007), Pet. App. 50a-51a.

The opinion of the United States Court of International Trade is reported at 341 F. Supp. 2d 1334 (Ct. Int'l Trade 2004), Pet. App. 3a-33a.

The final determination of the United States Department of Commerce in the underlying administrative review is reported at 66 Fed. Reg. 36,551 (July 12, 2001), Pet. App. 34a-49a.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2006. On February 6, 2007, the court of appeals entered an order denying Petitioners' timely motion for rehearing. On May 7, 2007, the Chief Justice granted Petitioners' application to extend the time for filing this Petition for a Writ of Certiorari to and including June 6, 2007.

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[1] On January 1, 2006, after the initiation of the underlying legal proceedings, Koyo Seiko Company, Ltd. changed its name to "JTEKT Corporation."

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Tariff Act of 1930 provides, in relevant part:

> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

19 U.S.C. § 1673.

The Tariff Act, as amended, further provides that "[t]he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," and "[t]he term 'weighted average dumping margin' is the percentage determined by dividing the aggregate dumping margins determined for a

specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(A)-(B).

Finally, the Tariff Act, as amended, provides that "[i]n determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a).

STATEMENT OF THE CASE

This case presents two significant issues: (1) a circuit split between the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Federal Circuit on whether an agency's decision to change an administrative rule under which it previously rendered a decision adverse to a party requires a federal court on appeal to remand the case to the agency; and (2) whether a federal court must remand such a case to the agency when the change in rule is dictated by international treaty obligations, consistent with the constitutional separation of powers.

The Federal Circuit effectively answered both questions in the negative and refused to consider remanding this case, despite the fact that Petitioners were held liable by the United States Department of Commerce ("Commerce") for "dumping" under a policy that Commerce has since announced it will abandon. Commerce's change in policy was prompted by a decision of the World Trade Organization ("WTO"), holding that the procedure Commerce applied in this and other cases violates the United States' treaty obligations. The Federal Circuit's refusal to remand this case creates an unnecessary conflict with longstanding precedent of the D.C. Circuit, and an unwarranted schism in the law governing federal agencies, and violates important separation of powers principles by creating an obstacle to the Executive

Branch's ability to discharge the nation's treaty obligations. A writ of certiorari is required to correct the Federal Circuit's error, resolve the conflict between the courts of appeals, and restore the Constitution's balance in the field of foreign affairs.

A. Antidumping Proceedings.

Koyo and NTN are producers of various kinds of automobile parts and antifriction bearings, with facilities in Japan, the United States, and elsewhere around the world. In 1988, at the request of a domestic producer of antifriction bearings, Commerce and the United States International Trade Commission ("Commission") instituted an "antidumping" investigation of antifriction bearings imported from various countries, including Japan.[2] In an antidumping investigation, the Commission examines whether or not an industry in the United States is materially injured, or threatened with material injury, by reason of imports of merchandise. 19 U.S.C. § 1673(2). Simultaneously, Commerce investigates whether or not the merchandise is being sold, or is likely to be sold, in the United States at less than its fair value. *Id.* § 1673(1). If the final determinations of both agencies are affirmative, Commerce may (pursuant to the Tariff Act of 1930) impose upon the merchandise an antidumping "duty" equal to the amount by which the "normal value" of the merchandise (*i.e.*, the statutorily-adjusted price of the product in Japan) exceeds the statutorily-adjusted price of the product in the United States. *Id.* § 1673. This amount is known as the "dumping margin." *Id.* § 1677(35).

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[2] "Dumping" is a form of international price discrimination whereby an exporter sells its merchandise in the country of importation at prices lower than those at which it sells the same goods in its home market. *See* Jacob Viner, *Dumping: A Problem in International Trade* 4-5 (Augustus M. Kelley 1996) (1922).

Once an initial investigation is complete and an antidumping order has been issued, tentative dumping liability is established. Interested parties may, however, request an "administrative review" of the duty in each year following Commerce's initial investigation and order. *Id.* § 1675(a). The purpose of this annual review is to recalculate the antidumping margins for individual importers and assess the importer's actual dumping liability for the year. Thus, "administrative reviews" are distinct from initial "investigations," although the two administrative procedures are closely analogous.

Commerce issued an antidumping duty order on antifriction bearings from various countries, including Japan, on May 15, 1989. Since the imposition of the order, annual administrative reviews of the antidumping order have been requested with respect to the sales of both Koyo and NTN. This case results from the eleventh such annual review, covering the period May 1, 1999 to April 30, 2000.[3]

B. The Anti-Dumping Agreement And Uruguay Round Agreements Act.

In 1994, the United States signed and ratified the Uruguay Round Agreements, which established the WTO and required all Members to conform their antidumping practices to the terms of the treaty. See *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Marrakesh Agreement Establishing the WTO, Annex 1A (Apr. 15, 1994) ("Anti-Dumping Agreement").[4] In calculating antidumping duties, Article 2.4 of the Anti-Dumping Agreement requires that

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[3] *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom*, 66 Fed. Reg. 36,551 (July 12, 2001) (Final Admin. Review), Pet. App. 34a-49a.

[4] *Reprinted in* H.R. Doc. No. 103-316, vol. I, at 1453-77 (1994).

> *[a] fair comparison shall be made between the export price and the normal value.* This comparison shall be made at the same level of trade, normally at the exfactory level, and in respect of sales made at as nearly as possible the same time.

Id. art. 2.4 (emphasis added.) Congress incorporated this requirement into U.S. law in the Uruguay Round Agreements Act of 1994 ("URAA"), Pub. L. No. 103-465, § 224, 108 Stat. 4809, 4878 (codified at 19 U.S.C. § 1677b(a)).

C. Commerce's "Zeroing" Practice.

In the administrative review at issue in this case, Commerce applied a rule known as "zeroing" when calculating Petitioners' dumping margins. When an importer sells merchandise in the country of importation at a price that is above the normal value, it results in a "negative dumping margin," which (as the WTO has held) should be included in the calculation to offset any "positive dumping margins" (*i.e.*, the margins generated by sales in the country of importation at prices below the normal value) when determining the weighted average dumping margin for that importer. Commerce, however, converts any negative dumping margins to zero when determining the importer's weighted average dumping margin, while accounting fully for any positive dumping margins. In this way, zeroing negates the benefit to importers from the fact that some of their sales in the United States (the country of importation) are at prices above the normal value.

This calculation methodology, therefore, artificially inflates the weighted average dumping margin, and can result in a positive weighted average margin even though the negative margins are equal to or greater than the positive margins.[5]

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[5] As a simple example, assume that only two U.S. sales of the subject merchandise occurred during the relevant period, one with a U.S. price, after adjustment, of $600, and the other with a U.S. price of $400. Assume further that the normal value in each case is $500. Thus, the first

Essentially, Commerce puts a heavy thumb on the scale in favor of finding the existence of, and inflating the amount of liability for, dumping. Indeed, "[b]y zeroing negative margins Commerce [would] find that some dumping occurred if *any* U.S. sales were made below the average [normal value,] even if the vast majority of sales made by the subject foreign producers in the United States were at prices higher than the average [normal value]." *Bowe Passat Reinigungs- und Waschereitechnik GmbH* v. *United States*, 926 F. Supp. 1138, 1149-50 (Ct. Int'l Trade 1996) (emphasis added) (internal quotation marks omitted).

In the investigation phase and in each of the annual reviews of its order, including the annual review at issue, Commerce has used zeroing to calculate the antidumping duty margins for Koyo and NTN. In this review, Commerce calculated, using zeroing, weighted-average dumping margins for Koyo of 10.10% for ball bearings, 5.27% for cylindrical roller bearings, and 0.00% for spherical plain bearings; and weighted-average dumping margins for NTN of 9.16% for

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transaction has a dumping margin of -$100, and the second has a dumping margin of $100. Under the Department's zeroing practice, the -$100 would be converted to zero, and the weighted average dumping margin would be calculated as follows:

$$\frac{0 + \$100}{\$600 + \$400} = 10 \text{ percent}$$

If the full effect of the negative dumping margin transaction were considered, however, the weighted average dumping margin would be:

$$\frac{-\$100 + \$100}{\$600 + \$400} = 0 \text{ percent}$$

The result of the Department's practice was to impose a 10% antidumping duty on all of the company's imports of the subject merchandise into the United States, rather than the mathematically correct duty-free treatment those imports should have received.

ball bearings,[6] 16.26% for cylindrical roller bearings, and 3.60% for spherical plain bearings.

Both Koyo and NTN challenged Commerce's use of zeroing in their administrative briefs before the agency during the course of the review, and explained that if their negative margins were properly included in the calculation of their weighted average margins, those margins would be negative. In other words, but for Commerce's use of the zeroing practice, neither Petitioner would have been liable for dumping in this annual review, and they would be entitled to a refund of their cash deposits, which accumulated in the millions of dollars.

D. The WTO Has Found That Commerce's Zeroing Practice Violates The United States' International Obligations, And Commerce Has Agreed Fully To Implement This Determination.

Petitioners appealed Commerce's antidumping determination in its eleventh administrative review to the Court of International Trade, which held that Commerce's use of the zeroing methodology was a permissible interpretation of the antidumping statute. Pet. App. 20a-21a. Petitioners appealed to the Federal Circuit, which affirmed the Court of International Trade's decision without opinion. See *id.* at 1a-2a.[7]

After the court of appeals' decision, but before the Federal Circuit issued its mandate, the Department of Commerce announced that it would not use zeroing in any pending or future dumping investigation. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin*

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[6] This margin was later revised to 8.98% for reasons unrelated to this Petition.

[7] The Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade governing Commerce decisions under the antidumping statute. *See* 28 U.S.C. § 1295(a)(5).

During an Antidumping Investigation, 71 Fed. Reg. 77,722, 77,725 (Dec. 27, 2006) , *amended by* 72 Fed. Reg. 3783 (Jan. 26, 2007).[8] Commerce's change in policy was prompted by an earlier WTO decision (in a case brought against the United States by the European Community) that zeroing violates the treaty when used in initial investigations. See Appellate Body Report, *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")* ¶ 263, WT/DS294/AB/R (Apr. 18, 2006).

Before the Federal Circuit issued its mandate, the WTO Appellate Body also issued another decision that covered, *inter alia,* this very case, holding that Commerce's zeroing practice did not ensure a "fair comparison" as required by the Anti-Dumping Agreement and thus violated the United States' treaty obligations when used in *either* initial investigations or annual administrative reviews. See Appellate Body Report, *United States – Measures Related to Zeroing and Sunset Reviews* ¶¶ 138, 166, 176, WT/DS322/AB/R (Jan. 9, 2007) (hereinafter "*U.S. – Zeroing (Japan)*"), Pet. App. 53a-54a.[9] The WTO Dispute Settlement Body adopted the Appellate Body's report as the final action of the WTO on January 23, 2007. See Action by the Dispute Settlement Body, *United States – Measures Relating to*

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[8] Commerce stated that this change in rule would become effective on January 16, 2007. It later extended this date to February 22, 2007. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 72 Fed. Reg. 3783 (Jan. 26, 2007).

[9] The WTO's decision was issued in response to a complaint brought against the United States by Japan, which included the application of zeroing to Petitioners in the annual review at issue here. *See* Request for Consultations by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/1 (Nov. 29, 2004).

Zeroing and Sunset Reviews, WT/DW322/15 (Jan. 30, 2007).[10]

In light of the Department of Commerce's change in the rule governing investigations, and the WTO's determination that zeroing likewise violates the United States' treaty obligations when employed in administrative reviews, *including the very review that is the subject of this appeal*, Petitioners jointly requested rehearing by the Federal Circuit and a stay of the mandate for the purpose of seeking a remand of this case to the agency for further consideration. The Federal Circuit inexplicably refused. See Pet. App. 51a.

On February 20, 2007, the United States formally announced, as expected, that it would comply fully with its treaty obligations in light of the WTO's decision in *U.S. – Zeroing (Japan)*, which extends to the administrative review that is the subject of this appeal. See Dispute Settlement Body, *Minutes of the Meeting* ¶ 34, WT/DSB/M/226 (Mar. 26, 2007) (hereinafter "*Minutes*"), Pet. App. 58a; Statement of David P. Shark, U.S. Deputy Chief of Mission, WTO (Feb. 20, 2007), *available at* http://www.usmission.ch/Press2007/0220DSB.html (hereinafter "Statement of David P. Shark"). The United States has committed to Japan that it will fully implement the Appellate Body's decision by December 24, 2007. See Agreement on Reasonable Period of Time, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/20 (May 8, 2007) (hereinafter "*Agreement*"), Pet. App. 59a-60a. The United States cannot fulfill its diplomatic commitments regarding this administrative review, however, unless the case is remanded to the Department of Commerce to allow the agency to decide how to implement the WTO's decision. The Federal Circuit inexplicably refused to follow this perfectly reasonable course.

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[10] The WTO maintains a complete electronic collection of the documents filed in this case, available at http://www.wto.org/english/tratop_e/ dispu_e/cases_e/ds322_e.htm.

REASONS FOR GRANTING THE PETITION

This petition presents an exceptionally important issue that exposes a conflict between the Federal Circuit and the United States Court of Appeals for the District of Columbia Circuit in the law governing federal agencies, and concerns a serious (and unnecessary) judicially created obstacle to the executive branch's ability to implement the United States' treaty obligations. A writ of certiorari is warranted to harmonize the courts of appeals' rules and preserve the constitutional separation of powers.

First, the decision below is inconsistent with longstanding law in the D.C. Circuit and precedents of this Court. As explained, the Department of Commerce found Koyo and NTN liable for dumping based on its "zeroing" rule—a decision Commerce renewed in the annual administrative review on which Petitioners' appeal is based. While this case was still before the Federal Circuit, the WTO held that the use of zeroing violates the United States' treaty obligations, particularly in this case. Commerce is charged with ensuring U.S. compliance with those treaty obligations and has previously responded to adverse WTO rulings on the subject of zeroing by announcing that it will comply with the WTO decision and stop using zeroing. In the D.C. Circuit, this situation would result in a remand to allow the agency to reconsider its decision in light of the changed rule. The Federal Circuit, however, has followed a contrary rule in this and other cases. This creates an intolerable conflict in the law governing federal agencies that should be resolved by this Court.

Second, the decision below creates a serious and wholly unnecessary obstacle to the Executive Branch's ability to discharge the nation's treaty obligations, and thus violates the constitutionally mandated separation of powers. Congress has placed responsibility for implementing WTO decisions squarely in the hands of the Executive Branch. The United

States has given the WTO and its treaty partners specific assurances that it will implement the WTO's rejection of zeroing in all cases (including *this specific case*), and has assured the WTO generally that the Department of Commerce (and not the courts) will decide whether to reopen completed investigations in light of subsequent rule changes. The Federal Circuit's refusal to remand antidumping cases to the agency for reconsideration in light of the demise of the zeroing procedure is flatly inconsistent with the nation's treaty obligations, and makes hollow the Executive Branch's diplomatic assurances that the United States will implement and comply with the WTO agreements in this and other cases. The Federal Circuit's decision below thus frustrates the Executive Branch's ability to conduct the foreign affairs of the United States. This unwarranted violation of separation of powers principles requires this Court's intervention. Indeed, if this Court does not correct the Federal Circuit's erroneous decision below, Petitioners will be left without a remedy for the treaty violations the WTO has identified in this case, because the Executive Branch will be unable to provide the remedy it has promised.

I. THE DECISION BELOW IS CONTRARY TO PRECEDENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND PERPETUATES AN UNWARRANTED CONFLICT IN THE LAW GOVERNING JUDICIAL REVIEW OF FEDERAL AGENCIES.

The D.C. Circuit—which like the Federal Circuit has statutory responsibility for reviewing many agency actions—has long held that a court reviewing an agency decision must remand the case to the agency when the agency has announced a change in its governing regulations or policies during the pendency of the appeal. In *Panhandle Eastern Pipe Line Co.* v. *FERC*, 890 F.2d 435 (D.C. Cir. 1989), for example, the Federal Energy Regulatory Commission denied

certain tariff sheets proposed by a natural gas pipeline company on grounds that the method of apportioning transportation entitlements was not allowed by FERC policy. While the appeal was pending, the FERC announced a change in policy that would allow the apportionment. The court of appeals held that the agency's announcement required it to remand the case to the agency. As the court explained,

> Such a disposition represents the intersection of two well-established doctrines. The first holds that an appellate court must consider the law in effect at the time it renders its decision, even when a change in governing law is made by an administrative agency. [Citing *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 281 (1969).] The second holds that a reviewing court may "not supply a reasoned basis for the agency's action that the agency itself has not given." [Quoting *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).] Thus, because we are at liberty neither to evaluate the Commission's decision under FERC's *old* policy[,] nor to assess on our own how Panhandle's tariffs would fare under FERC's *new* policy, we are required to remand so that the Commission may indicate how, if at all, its decision would be affected by its intervening policy change.

Id. at 438-39 (footnotes omitted). See also *Williston Basin Interstate Pipeline Co.* v. *FERC*, 165 F.3d 54, 62-63 (D.C. Cir. 1999) (remanding to the FERC where an intervening change in agency policy regarding the calculation of return on common equity might require the appellant's rate of return to be recalculated); *Nat'l Fuel Gas Supply Corp.* v. *FERC*, 899 F.2d 1244, 1249-50 (D.C. Cir. 1990) (remanding to the agency where the legal basis for an agency's decision was undercut in a subsequent court of appeals decision).

The D.C. Circuit did not fashion this rule out of whole cloth. As explained in *Panhandle*, this Court's "intersect[ing] doctrines" of applying the law in force at the time of appeal,

and declining to supply reasons for an agency decision on which the agency did not rely, *require* a remand when an agency bases a decision on a rule that it then changes while the aggrieved party's appeal is pending. See *Panhandle*, 890 F.2d at 438-39 (citing *Thorpe*, 393 U.S. at 281, and *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43).

In fact, the D.C. Circuit's rule was arguably dictated by this Court's decision in *NLRB* v. *Food Store Employees Union*, 417 U.S. 1 (1974), in which this Court reversed a court of appeals decision that purported to apply a changed agency rule to the circumstances of the case before it. This Court explained, *inter alia*, that "a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act." *Id.* at 10 n.10.[11]

The Federal Circuit's decision in this case is inconsistent with the rule in the D.C. Circuit and the decisions of this Court on which the D.C. Circuit's longstanding rule is based. Here, before the Federal Circuit issued its mandate, the WTO held that Commerce's zeroing rule as used in investigations violated the treaty. Commerce announced that it would no longer use zeroing in investigations, and the WTO further ruled that Commerce's zeroing practice violates the United States' obligations under the Antidumping Agreement when used in administrative reviews, including the one at issue in this case. In light of these developments, Petitioners filed a petition for rehearing in the Federal Circuit requesting a stay for purposes of seeking a remand to the agency. Petitioners

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[11] Other courts of appeals have applied the *Food Store Employees* rule to require remands when agency decisions are later called into question by appellate decisions or changes in the governing agency rule. *See NLRB* v. *Coca-Cola Bottling Co. of Buffalo*, 55 F.3d 74, 78 (2d Cir. 1995); *Blackman-Uhler Chem. Div., Synalloy Corp.* v. *NLRB*, 561 F.2d 1118, 1119 (4th Cir. 1977) (en banc).

explained that Commerce, and not the federal courts, should decide whether to implement the WTO's rejection of zeroing in this administrative review as it had in pending and future investigations. The Federal Circuit, however, refused to rehear the case or to issue a stay to determine whether a remand was necessary.[12] Less than three weeks after the Federal Circuit issued this decision, the United States (as expected) assured the WTO and its treaty partners that it would fully comply with its obligations under the Antidumping Agreement in light of the WTO's decision rejecting the use of zeroing in administrative reviews.[13]

The Federal Circuit's decision below is plainly inconsistent with the rule the D.C. Circuit follows, and the rationale underlying that rule. The WTO's condemnation of zeroing as violative of U.S. treaty obligations in this case, and Commerce's response to a prior condemnation of the same practice in a closely analogous category of administrative proceedings, made it abundantly clear that the Federal Circuit's decision rested on legal principles that the agency was extremely likely to (and in fact did) change. In the D.C.

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[12] The Federal Circuit has steadfastly refused to remand Commerce's antidumping determinations despite the WTO's repeated determinations that the zeroing rule is invalid, and despite Commerce's announced intention to follow the WTO's decisions. In addition to the decision below, the Federal Circuit recently refused a similar remand request in *Corus Staal BV* v. *Department of Commerce*, and a Petition for a Writ of Certiorari is currently pending before this Court in that case. *See* Petition for Certiorari, *Corus Staal BV* v. *United States*, No. 06-1057 (filed Jan. 25, 2007). As in this case, the Federal Circuit denied Corus' request for rehearing to remand to the Department of Commerce, despite the fact that the WTO had earlier held that zeroing was a violation of treaty obligations in that case, and Commerce announced its intention to comply with the WTO's ruling. *See id.* at 6-9, 11-12. Indeed, the Federal Circuit apparently felt that its no-remand rule was so well established that it denied Koyo's and NTN's request without *any* explanation for its decision. *See* Pet. App. 2a.

[13] *Minutes*, Pet. App. 58a; Statement of David P. Shark, *supra*.

Circuit, petitioner would have obtained a stay and remand so that Commerce could decide whether petitioner should be found liable for dumping under the agency's new policy.

The Federal Circuit has adopted a different rule, however, which requires Petitioners and the Department of Commerce to live with an agency decision that was based on a rule subsequently disapproved by the WTO and the Department of Commerce. These flatly inconsistent approaches to judicial review of agency actions should be resolved by this Court.

II. THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH THE CONSTITUTIONAL SEPARATION OF POWERS AND INTERFERES WITH THE EXECUTIVE BRANCH'S ABILITY TO COMPLY WITH THE UNITED STATES' TREATY OBLIGATIONS.

It is well established that the separation of powers requires courts to defer to the Executive Branch in matters involving the foreign affairs of the United States. See, *e.g.*, *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 35 (1945) ("[T]he courts should not so act as to embarrass the executive arm in its conduct of foreign affairs."); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936). Moreover, under the URAA, Congress has placed responsibility for implementing adverse WTO decisions squarely in the hands of the Executive Branch, specifically the Department of Commerce and the United States Trade Representative ("USTR"). See 19 U.S.C. §§ 3533(g), 3538.

The D.C. Circuit's remand rule—which accords with this Court's precedents—is doubly important in cases involving treaty obligations. In cases like this one, where an agency rule conflicts with treaty obligations and the Executive Branch announces its intention to modify its rule for that reason, a remand to the agency is necessary to allow the Executive Branch to reevaluate its earlier decision, thus minimizing the likelihood that the United States will act

contrary to its international obligations. Because the statute grants Commerce and the USTR sole responsibility for implementing adverse WTO decisions, a remand allows the Executive Branch properly to discharge its statutory and treaty obligations.

Indeed, the United States has given the WTO *specific assurances* that where (as here) an agency rule is to be revoked in implementing a WTO decision, "*Commerce* would need to decide what to do with respect to entries [*i.e.*, final administrative decisions] that took place prior to the date of revocation." Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶ 19, WT/DS221 (Mar. 8, 2002) (emphasis added), Pet. App. 66a. In that case, Canada challenged the United States' legal regime for implementing adverse WTO reports on grounds, *inter alia*, that it would not allow the Executive Branch to revisit its previously issued decisions when revoking an antidumping order. The United States argued, consistent with the remand rule that prevails in the D.C. Circuit, that *the agency* has authority to decide whether a policy change requires modification or reversal of the agency's prior decision, and that court-ordered remands were available as a vehicle by which implementation of WTO decisions could be obtained. *Id.* ¶ 19-20, Pet. App. 66a-67a. Based largely on this assurance, the WTO ruled that the United States was not in violation of its treaty obligations. See Panel Report, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶¶ 6.82-6.83, WT/DS221/R (July 15, 2002).

Consistent with these assurances, the United States also committed to the WTO in *this specific administrative review* that it will implement the WTO's rejection of zeroing. See *Minutes*, Pet. App. 58a; Statement of David P. Shark, *supra* (stating, in reference to the WTO's decision in *U.S. – Zeroing (Japan)*, that "the United States wishes to state that it intends to comply in this dispute with its WTO obligations and will

be considering carefully how to do so"). As explained, the United States has committed to Japan that it will fully implement the WTO Appellate Body's report by December 24, 2007. See *Agreement*, Pet. App. 59a. And, the Department of Commerce has stopped using zeroing in any new or pending antidumping investigations. See *Antidumping Proceedings*, 71 Fed. Reg. at 77,725. Petitioners are certainly entitled to a decision by the agency whether this change in policy applies to Petitioners' pending "administrative review," particularly since the Executive Branch has committed to the WTO and its treaty partners that it will implement the WTO's decision that zeroing violates treaty obligations in administrative reviews as well as investigations. See *U.S.-Zeroing (Japan)* ¶¶ 138, 166 (concluding that zeroing is inconsistent with the United States' treaty obligations in *both* "original investigations" and "periodic reviews"), Pet. App. 53a-54a.

The Federal Circuit's decision in this case prevents the United States from fulfilling its treaty obligations and implementing the assurances made by the Executive Branch to the WTO and U.S. treaty partners. A writ of certiorari is thus required to allow the Executive Branch to determine whether and how to comply with the WTO's explicit directives in this case. Indeed, unless this Petition is granted, there will be *no* way for the Executive Branch to comply with its treaty obligations in this administrative review, and Petitioners will be effectively unable to challenge dumping liability that was imposed in clear violation of the United States' treaty obligations.

As explained in footnote 12 above, the Federal Circuit's error is not an isolated incident. This is especially perplexing given the Federal Circuit's earlier solicitude for the Executive's prerogatives in such cases. In *Corus Staal BV* v. *Department of Commerce*, 395 F.3d 1343 (Fed Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006), decided after the WTO's rejection of zeroing in investigations but before Commerce's

announcement that it would implement fully the WTO's decision, the court of appeals explained that it could not usurp the Executive's role in deciding when and how to comply with treaty obligations.

> Congress ... has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement [the] WTO reports and determinations and, if so implemented, the extent of implementation.... We will not attempt to perform duties that fall within the exclusive province of the political branches.

Id. at 1349.

This attentiveness to the separation of powers was short-lived: as noted, the Federal Circuit abruptly and inexplicably changed its position in its next *Corus* decision and refused to remand the case to the agency following Commerce's announcement that it would repeal its zeroing rule. The same occurred here with regard to administrative reviews. Thus, the Federal Circuit is preventing the Executive from doing precisely what the court recognized the Executive should do. If not corrected by this Court, the Federal Circuit will perpetuate its error in all pending and future antidumping determinations to which adverse WTO decisions apply.[14]

* * * *

The Federal Circuit's decision in this case will frustrate the Executive Branch's attempts to implement the nation's treaty obligations, particularly in this and other antidumping proceedings. It also makes hollow the specific assurances the Executive Branch has made to the WTO and to U.S. treaty partners in this case, and assurances the United States made previously to the WTO in defending its legal regime for

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[14] As explained, the Federal Circuit has exclusive jurisdiction over appeals from antidumping decisions. *See* 28 U.S.C. § 1295(a)(5).

implementing adverse decisions. As this Court has emphasized, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting domestic legislation in such [a] manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995). The same principle applies here. The Federal Circuit's refusal to entertain Petitioners' request for rehearing and a stay for the purpose of seeking a remand to the agency threatens the Executive Branch's ability properly to conduct the nation's foreign affairs and treaty relationships. Accordingly, this Court should intervene to correct this unwarranted violation of the separation of powers.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 6, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

05-1297, 05-1323

SNR ROULEMENTS,

Plaintiff,

and

KOYO SEIKO CO., LTD. and KOYO CORPORATION OF U.S.A.,

Plaintiffs-Appellants,

and

NSK CORPORATION, NSK BEARINGS EUROPE, LTD., and NSK LTD.,

Plaintiffs,

and

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., and NTN BOWER CORPORATION,

Plaintiffs-Appellants,

and

NTN-BCA CORPORATION,

Plaintiff,

and

INA SCHAEFFLER KG and INA USA CORPORATION,

Plaintiffs,

v.

UNITED STATES,
Defendant-Appellee,

and

THE TORRINGTON COMPANY
(now known as Timken US Corporation),
Defendant-Appellee.

December 8, 2006, Decided
December 8, 2006, Filed

DECISION WITHOUT PUBLISHED OPINION

RADER, *Circuit Judge*, ARCHER, *Senior Circuit Judge*, and PROST, *Circuit Judge*.

JUDGMENT

This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

Per Curiam

AFFIRMED. See Fed. Cir. R. 36.

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

SLIP OP. 04-100.
COURT NO: 01-00686.

SNR ROULEMENTS, KOYO SEIKO CO., LTD., KOYO CORPORATION OF U.S.A., NSK CORPORATION, NSK BEARINGS EUROPE, LTD., NSK LTD., NTN-BCA CORPORATION, NTN BOWER CORPORATION, NTN-DRIVESHAFT, INC., AMERICAN NTN BEARING MANUFACTURING CORP., NTN BEARING CORPORATION OF AMERICA, NTN CORPORATION, INA-SCHAEFFLER KG, INA USA CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant,

and

THE TORRINGTON COMPANY,

Defendant-Intervenor.

Aug. 10, 2004

OPINION

GOLDBERG, *Senior Judge*.

In this action, plaintiffs challenge the United States Department of Commerce's ("Commerce") final determination in the 11th administrative review of dumping orders covering antifriction bearings in *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.; Notice of Final Results of Antidumping Duty Admin-*

istrative Reviews and Revocation, 66 Fed.Reg. 36551 (July 12, 2001) ("*Final Results*").[1] Defendant-Intervenor The Torrington Company ("Torrington") also challenges certain aspects of the *Final Results*. The *Final Results* covers the period of review May 1, 1999 through April 30, 2000 for ball bearings and May 1, 1999 through December 31, 1999 for cylindrical roller bearings and spherical plain bearings. Pursuant to USCIT R. 56.2, plaintiffs and defendant-intervenor move for summary judgment and request the Court to remand Commerce's *Final Results*.

For the reasons that follow, the Court sustains in part and reverses and remands in part the *Final Results*. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c).

I. *STANDARD OF REVIEW*

The Court will sustain the *Final Results* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). To determine whether Commerce's construction of the statutes is in accordance with law, the Court looks to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The first step of the test set forth in *Chevron* requires the Court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. It is only if the Court concludes that "Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear," that the Court will defer to Commerce's

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[1] Plaintiffs in this action are SNR Roulements ("SNR"); Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"); NSK Corporation, NSK Bearings Europe, Ltd., and NSK Ltd. ("NSK"); NTN-BCA Corporation, NTN Bower Corporation, NTN-Driveshaft, Inc., American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, and NTN Corporation ("NTN"), and INA-Schaeffler KG and INA USA Corporation ("INA").

construction under step two of *Chevron*. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed.Cir.1998). If the statute is ambiguous, then the second step requires the Court to defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 842. In addition, "[s]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed.Cir.2001) (interpreting *United States v. Mead*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)). Accordingly, the Court will not substitute "its own construction of a statutory provision for a reasonable interpretation made by [Commerce]." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed.Cir.1992).

II. *DISCUSSION*

A. Commerce's Exclusion of SNR's Imputed Expenses In Calculating Total Expenses For Constructed Export Price Profits Is In Accordance With Law.

SNR challenges Commerce's calculation of constructed export price ("CEP") profits, arguing that the inclusion of imputed expenses in its calculation of "total U.S. expenses" necessitates the inclusion of those same imputed expenses in its calculation of "total expenses."

CEP profits are determined by multiplying the total actual profit by the percentage determined by dividing the total United States expenses by the total expenses. 19 U.S.C. § 1677a(f)(1); 19 U.S.C. § 1677a(f)(2)(A). "Total actual profit" is defined as "the total profit earned by the foreign producer, exporter and affiliated parties . . . with respect to the sale of the same merchandise for which total expenses are determined[.]" 19 U.S.C. § 1677a(f)(2)(D). "Total expenses" consist of "all expenses . . . which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the U.S. seller

affiliated with the producer or exporter with respect to the production and sale of such merchandise." 19 U.S.C. § 1677a(f)(2)(C). The price used to establish CEP is reduced by "the amount of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or merchandise to which value has been added)." 19 U.S.C. § 1677a(d)(1). These expenses include "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties" and "any selling expenses not deducted under subparagraph (A), (B), or (C)." 19 U.S.C. § 1677a(d)(1)(B) and (D).

In short, when calculating CEP profit, the statute permits a reduction by the applicable percentage (i.e., a portion of total profit), thereby ensuring that the CEP profit calculation accurately reflects whether, and to what degree, the exporter has an unfair advantage over the domestic producer.

SNR argues that Commerce erred by not including imputed credit and inventory carrying expenses in its calculation of "total expenses"—because they were included in its calculation of "total United States expenses." SNR requests that this issue be remanded to Commerce with instructions to include the imputed credit and inventory carrying expenses in its calculation of "total expenses" for the purpose of calculating CEP profit.

Commerce denies that it failed to comport with the plain meaning of the statute and argues instead that its calculations are based on "normal accounting principles [which] permit the deduction of only actual booked expenses, not imputed expenses, in calculating profit." *See* Memo of the United States in Opposition to the Plaintiffs' Motions for Judgment upon the Agency Record ("Def.'s Br.") at 96. Commerce also argues that the inclusion of imputed expenses in the calculation of total expenses would result in a partial double counting of the expenses which would result in a distortion of

the ratio of total U.S. expenses to total expenses. *Id.* at 95. Additionally, Commerce argues that if Congress had intended to require both total U.S. expenses and total expenses to be calculated using the same figures Congress would not have used disparate definitions when defining the two terms. *Id.* Finally, Commerce cites *U.S. Steel Group v. United States*, 225 F.3d 1284 (Fed.Cir.2000), followed by the Court of International Trade in *Timken v. United States*, 26 CIT ___, 240 F.Supp.2d 1228 (2002), which specifically rejects the argument that symmetry must exist in the ratio of total U.S. expenses to total expenses.

The Court first turns to the plain language of the statute under *Chevron* step-one. First, the Court finds the statute does not clearly address the use of imputed expenses in the calculation of total expenses or total profit. *See Timken*, 26 CIT at ___, 240 F.Supp.2d at 1245; *cf. SNR Roulements v. United States*, 24 CIT 1130, 1139, 118 F.Supp.2d 1333, 1341 (2000); *NTN Bearing Corp. of America v. United States*, 25 CIT 664, 694, 155 F.Supp.2d 715, 743 (2001). Second, on the issue of whether computational symmetry is statutorily required, the Court refers to *U.S. Steel Group*, which sustained Commerce's practice of including imputed expenses in the calculation of total United States expenses, but not including imputed expenses in the calculation of total expenses. *See id.* at 1290. Symmetry between the two is not required because "the definitions of the Act themselves under cut symmetrical treatment of 'total U.S. expenses' and 'total expenses.'" *U.S. Steel Group*, 225 F.3d at 1290. Total U.S. expenses are not a subset of total expenses because "[t]he statute itself defines 'total U.S. expenses' distinctly, both structurally and substantively, from 'total expenses.'" *Id.* at 1289.

Even if *U.S. Steel Group* was not applicable to selling expenses, Commerce's methodology was a reasonable interpretation of the statute. *Timken*, 26 CIT at ___, 240

F.Supp.2d at 1246. "Commerce has some flexibility in determining total United States expenses under 19 U.S.C. § 1677a(d)(1)-(2) . . . [b]ut if Commerce decides to include a category of expenses in calculating total United States expenses . . . it must also include such expenses in [total expenses] *unless* they are already represented in total expenses *in some other fashion.*" *Thai Pineapple Canning Indus. Corp. Ltd. v. United States*, 23 CIT 286, 296, 187 F.3d 1362 (1999), *aff'd in part, rev'd in part*, 273 F.3d 1077 (Fed.Cir.2001) (emphasis added).

Although imputed numbers for total U.S. expenses may not be exactly the same as those for total expenses, they are reasonable surrogates for each other. *See Timken*, 26 CIT at ___, 240 F.Supp.2d at 1247. Following *Timken*, the Court holds that "although the definitions of both total United States expenses and total expenses direct Commerce to include a figure for selling expenses, it is not clear from the statute that these figures need to be precisely the same." *Timken*, 26 CIT at ___, 240 F.Supp.2d at 1237. "Theoretically, the total expenses denominator would reflect the interest expenses captured in the U.S. sales expenses numerator . . . *as well as* 'home' market interest expenses, because the total expenses denominator is derived from a net unit figure based on all company interest expenses without regard to sales destination." *Id.* (quoting *Thai Pineapple Canning Indus. Corp. Ltd. v. United States*, 24 CIT 107, 115, 2000 WL 174986 (2000) (emphasis added)).

Although companies may not track the per customer cost of maintaining inventory or extending credit, Commerce reasonably recognizes that companies do actually incur these costs. As a result, Commerce asks respondents to impute these costs to aid in the calculation of normal value and U.S. price. If a peculiarity or discrepancy arises as a result of the use of imputed amounts in the calculation of total U.S. expenses and the use of actual amounts in the calculation of

total expenses, Commerce's findings may be challenged (1) by demonstrating that a distortion was caused by different expenses over time or (2) that the inclusion of imputed expenses will not result in double counting because there were no actual U.S. expenses included in the actual booked expenses. The Court concludes that SNR has not demonstrated either condition. Commerce has shown that the actual booked expenses included in the calculation of total expenses account for amounts representing the imputed U.S. credit and inventory carrying expenses, and SNR has failed to demonstrate any peculiarity or discrepancy which necessitates the inclusion of imputed expenses because they are not otherwise accounted for.

Accordingly, Commerce's exclusion of imputed expenses in its calculation of total expenses for CEP profit is sustained.

B. Commerce's Use Of The 99.5 Percent Arm's Length Test To Exclude Certain Home Market Sales By Koyo To Affiliates Is In Accordance With Law.

In comparing Koyo's export prices to Koyo's home market prices, Commerce excluded from Koyo's home market sales database any sales to an affiliated party where the weighted average price was less than 99.5 percent of the weighted average price of non-affiliated parties. In light of the World Trade Organization ("WTO") Appellate Body's decision in *United States—Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001) ("*Hot Rolled Steel*"), Koyo asserts that this 99.5 percent "arm's length" test violates U.S. obligations under international law. In *Hot Rolled Steel*, the WTO Appellate Body held that the arm's length test established dumping in a manner impermissible under the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade ("Anti-Dumping Agreement").

To determine whether merchandise has been dumped, 19 U.S.C. § 1677b(a) requires Commerce to make "a fair comparison" between the export price and normal value. Commerce excludes from the calculation of normal value any sale to an affiliated party that is not comparable to sales to non-affiliated parties pursuant to 19 C.F.R. § 351.403(c). To ensure that sales to affiliates are comparable to sales to non-affiliates (i.e., at arm's length) under § 351.403(c), Commerce adopted the 99.5 percent arm's length test, which was applied in the *Final Results*.

The ambiguity of the statutes and regulations regarding the definition of "ordinary course of trade" precludes analysis under the first step of *Chevron*. *See Timken v. United States*, 26 CIT ___, ___, 240 F.Supp.2d 1228, 1240 (2002). Under the second step of *Chevron*, Commerce's use of the 99.5 percent arm's length test has been repeatedly upheld as reasonable. *See, e.g., Usinor v. United States*, 18 CIT 1155, 1158, 872 F.Supp. 1000, 1004 (1994) (affirming the test as reasonable where plaintiff failed to show that it distorted price comparability); *SSAB Svenskt Stal AB v. United States*, 21 CIT 1007, 1010, 976 F.Supp. 1027, 1030 (1997) (upholding the test as reasonable even though there was no showing that plaintiff had deliberately manipulated affiliate prices); *Micron Technology, Inc. v. United States*, 19 CIT 829, 846, 893 F.Supp. 21, 38 (1995) (sustaining Commerce's use of the test where plaintiff made no showing that its excluded affiliate sales had been made at arm's length).

1. Koyo Has Standing Under 19 U.S.C. § 3512(c)

Commerce asserts that 19 U.S.C. § 3512(c)[2] bars Koyo's claim that the arm's length test is inconsistent with the

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[2] Section 3512(c) states that "[n]o person other than the United States . . . may challenge . . . any action or any inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with [a WTO agreement]." 19 U.S.C. § 3512(c)(1).

WTO's decision in *Hot Rolled Steel*. Section 3512(c) bars private parties from bringing claims directly against the government alleging that Commerce acted inconsistently with a WTO agreement. However, Koyo's claim does not arise directly under the AntiDumping Agreement or any other WTO agreement. Rather, Koyo is "free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so." *Gov't of Uzbekistan v. United States*, 25 CIT 1084, 1088, 2001 WL 1012780 (2001). By relying on § 3512(c), Commerce merely asserts an "erroneous technical bar" in this case, and thus Koyo's claim is properly before the Court. *See Gov't of Uzbekistan*, 25 CIT at 1088, 2001 WL 1012780.

2. Relevance of Hot-Rolled Steel

The effect of WTO dispute settlement decisions on U.S. domestic trade law is intricate and rife with particularly delicate issues of statutory interpretation and separation of powers.

The classic tenet of statutory interpretation in light of international obligations is that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 81, 2 L.Ed. 208 (1804) ("*The Charming Betsy*"); *see also Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed.Cir.1995) ("[A]bsent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.")

The *Charming Betsy* doctrine may conflict in certain circumstances with the deference that courts owe to interpretations of statutory law by agencies.[3] A court must yield

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[3] *See* Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 Fordham Int'l L.J. 1533 (2001).

to an agency's interpretation of an ambiguous statute so long as it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. Agencies are accountable to the elected executive, and thus, policy decisions are best left to them rather than to non-elected judges. *See id.* at 865-66, 104 S.Ct. 2778. Moreover, the judiciary generally grants the executive branch an even greater level of deference in the area of foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936). However, courts have held that "Chevron must be applied in concert with the *Charming Betsy* doctrine when the latter is implicated." *Usinor v. United States*, 26 CIT ___, ___, 2002 WL 1998315, *8 (quoting *Hyundai*, 23 CIT at 313, 53 F.Supp.2d at 1344); *see also Timken*, 26 CIT at ___, 240 F.Supp.2d at 1240 (determining that "the court must determine if the Department's interpretation is reasonable, as informed by *Chevron* step-two and *Charming Betsy*").

WTO decisions are not binding on the Court nor on Commerce. *See Hyundai Elecs. Co. v. United States*, 23 CIT 302, 311, 53 F.Supp.2d 1334, 1343 (1999); *see also Corus Staal BV v. United States*, 27 CIT ___, ___, 259 F.Supp.2d 1253, 1273 (2003) (upholding Commerce's practice of zeroing contrary to a WTO Appellate Body decision concerning the European Communities' use of zeroing); *see also Timken*, 26 CIT at ___, 240 F.Supp.2d at 1242 (sustaining the arm's length test, in part by distinguishing *Hot Rolled Steel*). WTO decisions may, however, shed light on whether an agency's practices and policies are in accordance with U.S. international obligations. *See Hyundai*, 23 CIT at 311-12, 53 F.Supp.2d at 1343.

Timken examined the WTO's decision in *Hot Rolled Steel* as it related to the same application of the arm's length test and concluded that Commerce's 99.5 percent test was a reasonable interpretation of "ordinary course of trade." Thus, a closer look at both *Hot Rolled Steel* and *Timken* is warranted.

Hot Rolled Steel did not find that 19 U.S.C. § 1677b or 19 C.F.R. § 351.403 violated the Anti-Dumping Agreement. *Timken*, 26 CIT at ___, 240 F.Supp.2d at 1242. Rather, the WTO Appellate Body found that Commerce's 99.5 percent arm's length test does "not rest on a permissible interpretation of the term 'sales in the ordinary course of trade'" in Article 2.1 of the Anti-Dumping Agreement[4] due to its lack of "even-handedness." *Hot Rolled Steel* at ¶ 148. First, the test was found to be asymmetric because it automatically excludes lower-priced affiliate sales using a numerical threshold of 99.5 percent. *Id.* at ¶ 149. In contrast, there is no bright line test for higher-priced affiliate sales. Instead, such sales can be excluded from the calculation of home market sales only if Commerce deems the sales aberrationally high, a fact on which a respondent has the burden of proof. *Id.* at ¶ 151. The WTO Appellate Body determined that the 99.5 percent test is more likely to result in a higher home market price and, as a consequence, a finding of dumping. *Id.* at ¶ 154. In essence, *Hot Rolled Steel* concluded that Commerce is afforded considerable discretion in determining whether any given sales to affiliated parties are not in the ordinary course of trade but held that such discretion must be exercised in an evenhanded manner.

> *Timken* sustained Commerce's use of the arm's length test, distinguishing the case from the facts in *Hot Rolled Steel*. *Hot Rolled Steel* reasoned that exporters had no notice of the aberrationally-high standard and thus had no reason to supply evidence that high-priced sales to

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[4] Article 2.1 of the Anti-Dumping Agreement provides:

> [A] product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

affiliates were aberrational. *Id.* at ¶ 155. In contrast, Timken pointed out that the foreign respondent, Koyo, did have notice of the aberrationally-high standard. *Timken*, 240 F.Supp.2d at 1241. With such notice and Koyo's failure to argue that the arm's length test had excluded any sales in the ordinary course of trade, *Timken* reasoned that Koyo was not pre-judiced as the foreign respondents were *in Hot Rolled Steel*.[5] *See id.* at 1242. *Timken* found compelling Commerce's rationale for applying an asymmetric test—namely, that exporters are likely to provide advantageous information, such as why a high-priced affiliate sale is not in the ordinary course of trade, but may withhold disadvantageous evidence of lower-priced affiliate sales that are not in the ordinary course of trade. *Id.* at 1241-42.

The relevance of a WTO dispute settlement decision in this context lies solely in its persuasive force as a means of properly interpreting a controlling statute. *See Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60 ("[I]t is emphatically the province and duty of the judicial department to say what the law is."). This persuasive force, however, must be carefully balanced with the reasoned rulemaking process underlying *Chevron* step-two deference. The Court is wary of overstepping the bounds of its judicial authority under the guise of the *Charming Betsy* doctrine. *See*

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[5] Contrary to the reasoning in *Timken*, it is at least arguable that the WTO Appellate Body did not intend to confine its reasoning to the facts at issue in *Hot Rolled Steel*. Rather, *Hot Rolled Steel* held that "the *application* of the 99.5 percent test does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade.'" *Hot Rolled Steel* at ¶ 158 (emphasis in original). The *Hot Rolled Steel* decision rejected the rationale for Commerce's policy, applied to the specific case and generally. *See id.* at ¶ 157 (noting that Commerce's test focuses on the distortion of low affiliate prices whereas the Anti-Dumping Agreement's language applies to sales both above and below the home market price established in the ordinary course of trade).

Hyundai, 23 CIT at 313-14, 53 F.Supp.2d. at 1345 (stating that "unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine"). The Court is also mindful of the prerogative of the Executive Branch—most importantly, the Office of the U.S. Trade Representative—in dealing with the WTO in its diplomatic and policymaking roles. *See id.* at 312, 53 F.Supp.2d at 1343. Thus, in light of prior decisions that have found the 99.5 percent test to be reasonable, the Court holds that *Chevron* deference controls here.[6]

Accordingly, Commerce's use of the 99.5 percent arm's length test to exclude certain home market sales by Koyo to affiliated parties is sustained.[7]

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[6] The Court declines to reach the issue of whether a WTO dispute settlement decision interpreting a WTO agreement may constitute an international obligation under any circumstances in applying the *Charming Betsy* doctrine.

[7] The Court notes that since the publication of the *Final Results* and the filing of the instant case, Commerce has adopted a new policy for its arm's length test to comply with *Hot Rolled Steel*. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed.Reg. 69186 (Nov. 15, 2002). This change in methodology provides for the overall ratio calculated for an affiliate to be between 98 percent and 102 percent of prices to unaffiliated customers in order for sales to that affiliate to satisfy the arm's length test. *See id.* at 69187; *see also Stainless Steel Plate in Coils from Belgium: Preliminary Results of Antidumping Duty Administrative Review*, 69 Fed.Reg. 32501 (June 10, 2004) (applying the new test). Incorporating the reasoning of *Hot Rolled Steel*, Commerce has described this new test as "consistent with the view, expressed by the WTO Appellate Body, that rules aimed at preventing the distortion of normal value through sales between affiliates should reflect, 'even handedly,' that both high and low-priced sales between affiliates might not be 'in the ordinary course of trade.'" *Id.*

C. Commerce's Practice of Zeroing Is In Accordance With Judicial Precedent and Does Not Violate the Antidumping Statute.

Koyo and NSK challenge Commerce's practice of zeroing in its calculation of dumping margins. Commerce calculates the dumping margins on individual U.S. transactions and then calculates the weighted-average dumping margin "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate . . . constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B). In calculating the weighted-average dumping margin, Commerce treats transactions that produce "negative" dumping margins—that is, transactions in which the export price exceeds normal value—as if they were zero, a practice commonly referred to as "zeroing."

1. EC-Bed Linen *Is Not Binding or Persuasive*

Koyo first claims that Commerce's practice of zeroing is impermissible under U.S. law. Koyo argues that the decision of the WTO Appellate Body in *European Communities—Antidumping Duties on Import of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("*EC-Bed Linen*") prohibits Commerce's practice of zeroing. In *EC-Bed Linen*, the WTO Appellate Body found that the European Communities' ("EC") use of zeroing was inconsistent with the Anti-Dumping Agreement. Koyo argues that Commerce's practice is the functional equivalent of the EC's practice. *See* Motion of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. for Judgment on the Agency Record ("Koyo Br.") at 18-21. Koyo claims that zeroing is unlawful under the *Charming Betsy* doctrine.

With respect to Koyo's *EC-Bed Linen* argument, the Court is bound by the Federal Circuit's recent decision in *Timken v. United States*, 354 F.3d 1334 (Fed.Cir.2004). As a threshold matter, the Federal Circuit held, as the Court does here, that

Koyo's claim is not barred by 19 U.S.C. § 3512(c). *Id.* at 1341; *see also, supra*, III.B. *Timken*, however, rejected Koyo's WTO-based arguments by holding that Commerce's practice of zeroing was not prohibited by *EC-Bed Linen*: "In light of the fact that Commerce's 'longstanding and consistent administrative interpretation is entitled to considerable weight,' we refuse to overturn the zeroing practice based on *EC-Bed Linen*." *Id.* at 1344 (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978)). The Federal Circuit distinguished *Timken* from *EC-Bed Linen*, stressing that the United States had not been a party in the latter and that *EC-Bed Linen* had dealt with an antidumping investigation and not an administrative review as was the case in *Timken*. *Id.*

Accordingly, the Court holds that Commerce's use of zeroing is not invalidated by *EC-Bed Linen*.[8]

2. The Plain Language of the Antidumping Statutes Is Ambiguous and Mandates Deference to Commerce's Zeroing Practice

NSK and Koyo challenge zeroing as contradictory to the plain language of 19 U.S.C. § § 1673 and 1677. Commerce argues that the plain language of the antidumping statutes actually mandates zeroing. The Court holds that the language of 19 U.S.C. § 1673 neither unambiguously requires *nor* prohibits zeroing under the first step of *Chevron*.

NSK suggests that the plain meaning of 19 U.S.C. § 1673 unambiguously renders Commerce's practice of zeroing impermissible. *See* Memorandum of Points and Authorities

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[8] A divided WTO panel recently found Commerce's practice of zeroing to be impermissible under the Anti-Dumping Agreement. *See United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264 (Apr. 13, 2004) ("*Softwood Lumber*"). The Court finds *Softwood Lumber* insufficiently persuasive in light of the Federal Circuit's decision in *Timken*.

in Support of NSK Bearings Europe's Motion for Judgment on the Agency Record ("NSK Europe Br.") at 5. According to NSK, the focal point of an antidumping inquiry is the class or kind of merchandise.[9] Because § 1673 specifies that antidumping duties apply only when Commerce determines that a "class or kind of foreign merchandise" is being, or is likely to be sold at less than its fair value, "Commerce's dumping calculation violates this basic principle, because it trivializes the presence of U.S. sales above fair value by wiping out (i.e., by zeroing) the difference by which the export price or constructed price of these sales exceeds normal value." NSK Europe Br. at 11. NSK notes that other statutory provisions support the premise that zeroing is unlawful. NSK claims that the definition of "dumped" and "dumping" contained within 19 U.S.C. § 1677(34) "reformulates the first requirement of § 1673 that sales below fair value are dumped but sales above fair value are not." *Id.* at 8. NSK also maintains that the definition of "dumping margin" contained within 19 U.S.C. § 1677(35)(A) "reaffirms that dumping only exists when normal value exceeds the export price or constructed export price of *the subject merchandise*, which

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[9] NSK claims that the "entire structure of U.S. antidumping law" rests upon § 1673, which provides that:

> (1) the administering authority determines that *a class or kind of foreign merchandise* is being, or is likely to be sold, in the United States at less than its fair value, and
>
> (2) the Commission determines that . . .
>
> > (b) the establishment of an industry is materially retarded, by reason of imports of *that merchandise* or by reasons of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed *upon such merchandise* an antidumping duty . . . in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for *the merchandise*[.]

19 U.S.C. § 1673 (emphasis added).

section [19 U.S.C. § 1677(25)] defines as the 'class or kind of merchandise within the scope of an investigation.'" *Id.*

Even though NSK's argument presents what could be deemed logical inferences of 19 U.S.C. §§ 1673 and 1677, the logic does not go so far as to make NSK's interpretation of the statute unambiguous. Webster defines "class" as "a group, set, or kind marked by common attributes . . ." and "kind" as "a group united by common traits or interests." Webster's Third New International Dictionary (unabridged) 416, 1243 (1986). These definitions could be construed to require the subject merchandise to be considered in their entirety and thus bar zeroing. On the other hand, §§ 1673 and 1677 could also be construed to require Commerce to evaluate individual transactions only from the perspective of a common group of merchandise. Such an interpretation would leave the statutory authority ambiguous.

Koyo contends that Commerce's argument must fail because 19 U.S.C. § 1677 does not explicitly mention "zeroing." *See* Reply Brief of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. in Support of Their Motion for Judgment on the Agency Record at 13-19.

Commerce argues that the plain language of § 1677 unambiguously requires the zeroing of sales with negative margins. Commerce contends that § 1677(34) defines the terms "dumped" and "dumping" as "the sale or likely sale of goods at *less than* fair value" (emphasis added). Commerce also points to § 1677(35)(A), which defines the term "dumping margin" as "the amount by which the normal value *exceeds* the export price". Def.'s Br. at 53. Commerce also argues that a failure to zero out negative margins would permit those negative margins to effectively cancel out dumped sales, "effectively eviscerating the very purpose of the antidumping law." Def.'s Br. at 55.

A combined reading of §§ 1673 and 1677 does not unambiguously mandate zeroing. "A plain reading of the statute discloses no provision for Commerce to offset sales made at [less than fair value] with sales made at fair value." *Serampore Indus. Pvt. Ltd. v. Dep't of Commerce*, 11 CIT 866, 873, 675 F.Supp. 1354, 1360 (1987); *see Timken*, 354 F.3d at 1342. The use of the word "exceeds" in § 1677(35)(A) does not explicitly require that dumping margins be positive. *See Timken*, 354 F.3d at 1342. Thus, when considered in conjunction with relevant case law, NSK's and Koyo's respective arguments help serve to refute Commerce's claim that the statute unambiguously requires zeroing.

Having found the antidumping statutes ambiguous regarding zeroing, the Court next considers whether Commerce's practice is based on a permissible construction of the statutes under the second step of *Chevron*. In *Timken*, the Federal Circuit observed three reasons for affirming Commerce's practice of zeroing as a permissible construction of the dumping statute. First, the word "exceeds" could justify a practice of finding dumping margins only where the normal value "falls to the right of [the export price] on the number line." *Id.* Second, zeroing was found to be in accord with Commerce's practice of assessing dumping duties on an entry-by-entry basis. *Id.* Finally, because zeroing checks the practice of masked dumping—hiding a few transactions with dumped sales under the curtain of multiple sales at fair price—the Federal Circuit deemed the practice proper. *Id.* at 1343. Where Commerce has construed the statute in a way reasonably designed to prevent masked dumping, the Court will not substitute its own interpretation for that of Commerce. *See Serampore*, 11 CIT at 874, 675 F.Supp. at 1361.

It has been noted that statistical biases inherent in Commerce's zeroing practice prevent the statute from being equivocal. *See Bowe Passat Reinigungs-Und Waschereitechnik Gmbh v. United States*, 20 CIT 558, 570-72, 926 F.Supp.

1138, 1149-50 (1996) (upholding Commerce's zeroing practice "[u]nless and until it becomes clear that such a practice is impermissible or unreasonable"). The proportion of fair sales to dumped sales does not affect the Court's determination of the reasonableness of Commerce's interpretation. In *Bowe Passat*, the Court sustained Commerce's zeroing practice even where 92 percent of Bowe Passat's U.S. sales were made at or above fair market value. *Id.* at 571, 926 F.Supp. at 1149. Here, Commerce found a dumping margin where 67 percent of NSK Europe's U.S. sales and 89 percent of NSK Japan's U.S. sales exceeded normal value. *See* NSK Europe Br. at 2; Memorandum of Points and Authorities in Support of NSK Ltd.'s Motion for Judgment on the Agency Record ("NSK Japan Br.") at 2. The Court cannot find any basis for rejecting Commerce's determination on these grounds. *See Bowe Passat*, 20 CIT at 570-72, 926 F.Supp. at 1149-50.

NSK further claims that zeroing is not only biased, but punitive in nature, which is specifically prohibited in the antidumping statute. *See id.; see also Nat'l Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 558, 779 F.Supp. 1354, 1373 (1991) ("[A]ntidumping duty law . . . is intended to be remedial, not punitive").

To be punitive, a duty must lack relation between the cost imposed and the harm done. *See Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1380 (Fed.Cir. 2003). The statistical bias inherent in zeroing is mitigated by the fact that the denominator used in calculating the dumping margin includes sales both above and below fair value. *See Bowe Passat*, 20 CIT at 571-72, 926 F.Supp. at 1150. Such inclusion of fair value and dumped sales thus creates a rational connection between the harm done—dumping—and the penalty imposed—the dumping margin.

Accordingly, Commerce's zeroing of Koyo's and NSK's negative dumping margins is sustained.

D. Commerce's Use Of Adverse Facts Available To NTN's Home Market and U.S. Freight Expenses Was Reasonable and In Accordance With Law.

NTN challenges Commerce's use of adverse facts available to NTN's home market and U.S. freight expenses.

Commerce requested that NTN report its freight expense allocation in terms of weight. Pursuant to 19 C.F.R. § 351.401(g)(2), Commerce's questionnaire directed that if an interested party was unable to allocate freight expenses on the basis on which they were incurred, the party should have (1) explained how it allocated expenses; (2) explained why the party could not allocate expenses on any of the bases on which they were incurred; and (3) demonstrated that the allocation methodology used was not distortive. Rule 56.2 Motion and Memorandum For Judgment Upon the Agency Record Submitted On Behalf of the Plaintiffs and Defendant-Intervenors, NTN et al. at 6 ("NTN Br."). Commerce's regulations, specifically 19 C.F.R. § 351.401(g)(2), emphasize the importance that a party demonstrate why its own methods are not distortive. NTN determined that it could not report the freight expense allocation on the basis on which it was incurred because of multiple, inconsistent variables. Instead, NTN reported its freight allocation on the basis of the sales value of the merchandise, claiming it was the only consistent factor. While Commerce accepted this reporting methodology in past reviews, for this review, Commerce requested NTN to report its freight expense allocation in terms of weight, and sent NTN two supplemental questionnaires specifically requesting this information. NTN failed to comply. To justify its use of adverse facts available, Commerce determined that NTN was not cooperating to its full ability, and specifically that NTN failed to show why its methodology, in terms of value, was not distortive. Issues and Decision Memorandum for the Administrative Reviews of Antifriction Bearings (other than tapered roller bearings)

and parts thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom—May 1, 1999, through April 30, 2000 ("Issues and Decision Memo"), Comment 34.

Commerce is required to use facts otherwise available if a respondent "withholds information that has been requested" or "fails to provide such information by the deadlines for the submission of the information or in the form and manner requested." 19 U.S.C. § 1677e(a)(A) and (B).

The Court finds that Commerce adequately considered NTN's submission of freight expenses in terms of weight, and acted within its statutory authority in applying adverse facts. Commerce determined that because of NTN's refusal to submit the requested weight data, NTN did not cooperate to the best of its ability as is required by § 1677m(e). If Commerce anticipates rejecting a party's submitted information, § 1677m(d) requires Commerce to give notice of the deficiency to the party. Commerce complied with § 1677m(d) by giving sufficient notice to NTN in the two supplemental questionnaires, specifically requesting the data in terms of weight. Commerce explicitly determined that NTN did not comply with the requirements to use its own allocation methodology. Specifically, in pursuing its option of submitting an alternative methodology based on value, NTN never explicitly explained to Commerce why its methodology was not distortive as required by 19 C.F.R. § 351.401(g)(2). In addition, Commerce acted in accordance with § 1677m(c)(1), which requires Commerce to modify its request for information to avoid imposing an unreasonable burden on the respondent.[10] Commerce considered NTN's

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[10] Under 19 U.S.C. § 1677m(c)(1):

> If an interested party, promptly after receiving a request from the administering authority . . . for information, notifies the administering authority . . . that such party is unable to submit the information requested in the requested form and manner . . . , the administering authority . . . shall consider the ability of the inter-

ability to submit the freight expenses in terms of weight and determined that NTN would have been able to submit such information, regardless of NTN's contention that a ruling based on weight rather than value would have been distortive.

Accordingly, Commerce's use of adverse facts available for NTN's home market and U.S. freight expenses is sustained.

E. Commerce's Inclusion Of NTN's Export Price Sales in Calculating Constructed Export Price Profit Adjustment Is In Accordance With Law.

NTN argues that Commerce should not have included export price ("EP") sales in its calculation of CEP profit adjustment. NTN asserts that 19 U.S.C. § 1677a(f)(2)(C), which defines total expenses as "all expenses in the first of three categories which applies and which are incurred by or on behalf of the foreign like product sold in the exporting country" does not include any explicit provision about export price expenses. Therefore, based on the plain language of the statute, Commerce may not include EP sales in its CEP profits.

Commerce responds that its inclusion of EP sales in CEP profits is a reasonable interpretation of § 1677a(f)(2)(C), consistent with its prior practice, and otherwise in accordance with law. According to Commerce, "'total expenses' refers to all expenses incurred with respect to the subject merchandise sold in the United States. . . . Thus, where the respondent makes both export-price and CEP sales to the United State[s] (sic), sales of the subject merchandise would encompass all such transactions." Def.'s Br. at 32. There-

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ested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

19 U.S.C. § 1677m(c)(1).

fore, as NTN made both EP and CEP sales in the United States, Commerce's inclusion of EP sales is proper.

The Court finds that Commerce's decision to include EP sales in the CEP profit adjustment calculation was reasonable and in accordance with law. The term total expenses is not exclusive to CEP sales but may also include EP expenses. *See Torrington Co. v. United States*, 25 CIT 395, 426, 146 F.Supp.2d 845, 882 (2001), *aff'd*, 62 Fed.Appx. 950 (Fed.Cir.2003). Because "subject merchandise" refers to the class or kind of merchandise that is within the scope, it is reasonable for Commerce to include EP sales when EP sales were made. *Id.* In the first category of expenses, total expenses include "subject merchandise sold in the United States," including any merchandise within the scope of the review. *Id.* This definition also includes EP sales, as EP sales were made by NTN.

Accordingly, Commerce's inclusion of EP sales in the CEP profit adjustment calculation is sustained.

F. Commerce's Inclusion of NTN's CT Scan Bearings in the Margin Calculation Is Remanded for Clarification.

Commerce included CT scan bearings in its calculation of NTN's dumping margin even after informing NTN that CT scan bearings would be excluded from the scope of the administrative review. NTN argues that Commerce should exclude NTN's CT scan bearings from its margin calculation. In its original investigation, Commerce found "slewing rings" or "turntable bearings" to be distinct from antifriction bearings. Seeking to confirm that Commerce would continue to exclude these bearings from the scope, NTN requested a ruling from Commerce on this issue on May 24, 2001. Commerce responded to NTN by letter, dated July 10, 2001, ruling that "turntable slewing bearings are not within the scope of the order." NTN Br., Attachment A. Two days later, on July 12, 2001, Commerce issued the *Final Results*, which

included these same bearings in the margin calculations. *See* 66 Fed.Reg. at 36552.

In response, Commerce argues that recalculating the margin would create an administrative burden, add uncertainty, and defeat the principle of finality. *See* Def.'s Br. at 51. Commerce also claims that the *Final Results* had already been signed for five days prior to the issuance of the July 10, 2001 letter.

The Court finds that Commerce did not adequately address the issue raised by NTN. Accordingly, the Court remands this issue with instructions to clarify the circumstances in which the July 10, 2001 letter, confirming the exclusion of CT scan bearings, was published while the *Final Results* included the same subject merchandise.

G. Torrington Did Not Exhaust Its Administrative Remedies by Applying for a Scope Inquiry Regarding INA Steering Column Supports.

Commerce excluded INA's steering column supports from the scope of the antidumping order covering cylindrical roller bearings from Germany. Torrington asserts that Commerce's failure to initiate a scope inquiry was contrary to law; alternatively, Torrington argues that Commerce's determination that the steering column supports were outside the scope of the order was not supported by substantial evidence or in accordance with law.

Under 19 C.F.R. § 351.225(b), Commerce is obligated to self-initiate a scope inquiry only when, based on the available information, it cannot determine whether a product is included within the scope of an order. Commerce argues that it was able to make a decision as to the scope based on the available product descriptions, and therefore, was not obligated to self-initiate a scope inquiry.

Torrington, however, did not have to rely on Commerce's judgment. If Torrington was not satisfied with Commerce's decision on the matter, the regulations also provide that any interested party may request a scope inquiry as provided by 19 C.F.R. § 351.225(c)(1). Although Torrington "vigorously contested Commerce' [sic] determination to accept INA's exclusion of the product based on its informal inquiry," Torrington did not formally apply for a scope inquiry. The Torrington Company's Reply Brief at 3. As a result, because it failed to apply for a ruling as permitted by the regulations, Torrington failed to exhaust its administrative remedies.

Whenever warranted, the Court is obligated to require the exhaustion of administrative remedies before an issue can be properly addressed here. 28 U.S.C. § 2637(d). The "detailed scope determination procedures that Commerce has provided constitute precisely the kind of administrative remedy that must be exhausted before a party may litigate the validity of the administrative action." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599-600 (Fed.Cir.1998).

Accordingly, because Torrington did not exhaust its administrative remedies by applying for a scope inquiry, the Court does not have jurisdiction to address the issue of whether certain cylindrical bearings fell within the scope of the antidumping order.

H. Commerce's Acceptance of Koyo's Method of Calculating Air and Ocean Freight Expenses Is Supported by Substantial Evidence and Otherwise In Accordance With Law.

Torrington challenges Commerce's acceptance of Koyo's method of calculating air and ocean freight expenses. Koyo calculated a single international freight expense factor by weight, using the aggregate expenses for both air and ocean freight divided by the total weight of all bearings shipped to the United States. Torrington argues that Koyo could and

should have either reported its international freight expenses on a transaction-specific basis or separately reported air and ocean freight expenses, allocating the air freight expenses in a more specific manner. The Torrington Company's Memorandum In Support Of Its Rule 56.2 Motion For Judgment Upon the Agency Record ("Torrington Br.") at 56. Torrington claims that Koyo's allocation method led to significant inaccuracies. According to Torrington, accurate reporting of air freight expenses would decrease U.S. prices and therefore increase Koyo's dumping margins. *Id.* at 69.

19 U.S.C. § 1677a(c)(2)(A) provides for an adjustment to EP or CEP for the amount attributable to any costs incident to bringing subject merchandise into the United States. Pursuant to § 1677a(c)(2)(A), Commerce deducts air and ocean freight costs. Commerce "may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided . . . that the allocation method used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(1). A party seeking to submit allocated expenses and price adjustments must demonstrate "that the allocation is calculated on as specific a basis as feasible and must explain why their allocation methodology used does not cause inaccuracies." 19 C.F.R. § 351.401(g)(2).

At issue here is whether Koyo was capable of reporting its air freight expenses in a more specific manner. Torrington claims that since Koyo only shipped via air freight on an emergency basis to deal with low inventories, it would not have been infeasible for Koyo to have reported transaction-specific air freight expenses. *See* Torrington Br. at 64. Koyo responds that this would not have been feasible because it did not possess records that would allow the linkage of units shipped by air to specific sales in the United States. *See Memorandum of Koyo Seiko Co., Ltd. and Koyo Corporation U.S.A. in Response to Torrington's Motion for Judgment on the Agency Record* ("Koyo Resp. Br.") at 15.

To require Koyo to submit more specific air and ocean freight expenses, Torrington must first establish linkage between the shipments and specific sales in the United States. *See Torrington Co. v. United States*, 21 CIT 491, 498, 965 F.Supp. 40, 45 (1997) (respondent's reporting methodology is permissible because "[t]he documents cited by Torrington do not provide a means of linking individual sales to specific shipments"). Torrington does not adequately demonstrate such linkage based upon documents on the record. Torrington erroneously focuses on how Koyo *could have* documented its shipments in a manner that would allow for more specific reporting of its international freight expenses. Torrington's argument is misplaced as § 351.401(g)(1) refers to the feasibility of using existing documents to use transaction-specific reporting—*not* the feasibility of maintaining records that would allow such reporting. *See also* 19 U.S.C. § 351.401(g)(3) (Commerce must consider "the records maintained by the party in question in the ordinary course of business"). Nothing suggests that companies are required to make wholesale changes to their record-keeping practices to comply with § 351.401(g)(1).

The Court must also determine whether Commerce adequately investigated Koyo's proposed methodology to determine whether it was reasonable and representative. *See Torrington Co. v. United States*, 21 CIT 686, 695, 969 F.Supp. 1332, 1339 (1997). Commerce has the authority to accept averages rather than transaction-specific data "as long as the methodology chosen by a respondent is reasonable and supported by information contained in the administrative record." *Torrington*, 21 CIT at 497, 969 F.Supp. 45. As part of the sixth administrative review, Commerce verified Koyo's reporting methodology. By tracing data from freight invoices to reports provided by freight carriers, Commerce determined that it did accurately represent Koyo's shipping expenses. There is nothing in the record that demonstrates Koyo has

altered its methodology since Commerce conducted its inquiry in the sixth administrative review.

Accordingly, Commerce's acceptance of Koyo's method of calculating air and ocean freight expenses is sustained.

I. Commerce's Treatment of NTN's Sales to Affiliated Parties Is Supported By Substantial Evidence.

In the *Final Results*, Commerce applied the arm's length test to NTN's sales to affiliated parties. Torrington challenges Commerce's decision on two separate grounds: (1) that Commerce erred in not applying facts available to NTN's affiliates and (2) that Commerce improperly disregarded certain downstream sales in its calculation of normal value.

Torrington argues that when calculating normal value, Commerce erred by relying on sales figures to affiliates as reported by NTN rather than on downstream sales or facts available. Although downstream sales may be used to calculate normal value when the foreign like product is sold to an affiliated party, Commerce may not rely on downstream sales if the "arm's length" test is satisfied. 19 C.F.R. § 351.403(c). Commerce explained that a model-specific comparison of sales to affiliated and unaffiliated parties showed that sales to affiliated parties were an average of 99.5 percent or more of the price of sales to unaffiliated parties. As a result of this comparison, Commerce concluded that NTN's sales to affiliated parties satisfied the arm's length test and therefore formed a reasonable basis for calculating normal value. *See* Issues and Decision Memo at Comment 25. Therefore, according to Commerce, it was unnecessary to rely on downstream sales or facts available when calculating normal value.

Torrington points out, however, that Commerce has recognized that the 99.5 percent arm's length test is not the sole method for dealing with the issue of sales to affiliated parties. *See* Torrington Br. at 46 (citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed.Reg. 27296, 27355

(May 19, 1997)). However, Torrington fails to point out that in the next sentence Commerce announced that it will "continue to apply the current 99.5 percent test unless and until [it] develop[s] a new method." *Id.* Commerce found that this 99.5 percent arm's length test was suitable and that it was satisfied. Acting in accordance with 19 C.F.R. § 351.403(c), Commerce did not err in relying on NTN's reported sales figures rather than on downstream sales or facts available when calculating normal value.

In prior reviews and the preliminary results of this administrative review, NTN's failure to supply all downstream sales through affiliated resellers resulted in Commerce's application of adverse facts available in its calculation of normal value. Commerce did not, however, apply adverse facts available in the *Final Results*. Issues and Decision Memo at Comment 2. Citing *Queen's Flowers de Colombia v. United States*, 21 CIT 968, 981 F.Supp. 617 (1997), Torrington points out that an agency is required either to conform to its prior decisions or to explain the reasons for its departure. As a result, Torrington argues that Commerce's failure to use adverse facts in the *Final Results*, without providing an explanation of its reasoning, requires the issue to be remanded for further explanation.

Commerce argues that its previous decisions are not binding. In addition, Commerce concluded in the *Final Results* that because NTN's reported sales satisfied the arm's length test they provided Commerce with a reasonable basis for calculating normal value. Therefore, according to Commerce, it can hardly be said that Commerce failed to comply with its prior decisions.

Commerce may, but is not required to, apply adverse facts when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). Given Commerce's satisfaction with NTN's compliance with requests for addi-

tional information and explanations and Commerce's reasonable conclusion that it had sufficient information to calculate normal value, Commerce is not compelled to use adverse facts available. Because Commerce is not bound by prior decisions based on different facts and because applying adverse facts available in the case at hand is unwarranted, the Court holds that there is no basis for remanding this issue for further clarification.

As to the second issue, Commerce claims that it was unable to use downstream sales data for sales to affiliates that did not satisfy the arm's length test because matching downstream figures were unavailable. Def.'s Br. at 75. Torrington argues that this is not supported by the evidence and that Commerce's failure to request the allegedly missing data constitutes a blatant abrogation of its statutory duty to conduct an adequate investigation. *See Freeport Minerals Co. v. United States*, 776 F.2d 1029 (Fed.Cir.1985). Upon reviewing the record, the Court holds that Commerce did not err by deciding not to use [sic] certain downstream sales data. Commerce's decision not use these downstream sales is in accordance with 19 U.S.C. § 1677(16), which states that Commerce is not required to "obtain information on all possible sales of the foreign like product." Furthermore, Commerce exercised its discretion pursuant to 19 C.F.R. § 351.403(c), which states that "[i]f an importer or producer sold the foreign like product through an affiliated party, the Secretary *may* calculate normal value based on such sale by the affiliated party." Commerce, after reviewing the record evidence, concluded that it was not "necessary or appropriate to require the reporting of [downstream sales] . . . in all instances." *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed.Reg. at 27356.

Accordingly, Commerce's treatment of NTN's sales to affiliated parties is sustained.

III. *CONCLUSION*

For the aforementioned reasons, the *Final Results* is sustained in part and reversed and remanded in part.

A separate order will be issued accordingly.

APPENDIX C

NOTICES

DEPARTMENT OF COMMERCE

International Trade Administration

[A-427-801, A-428-801, A-475-801, A-588-804, A-401-801, A-412-801]

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part

Thursday, July 12, 2001

For a complete version of this memorandum, see 66 ITADOC 36551.

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part.

SUMMARY: On February 5, 2001, the Department of Commerce published the preliminary results of the administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom. The merchandise covered by these orders are ball bearings and parts thereof, cylindrical roller bearings and parts thereof, and spherical plain bearings and parts thereof. The reviews cover 56 manufacturers/exporters. The periods of review are May 1, 1999, through April 30, 2000, for ball bearings and May 1, 1999, through December 31, 1999, for cylindrical roller bearings and spherical plain bearings.

Based on our analysis of the comments received, we have made changes, including corrections of certain programming and other clerical errors, in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled "Final Results of the Reviews."

EFFECTIVE DATE: July 12, 2001.

FOR FURTHER INFORMATION: Please contact the appropriate case analysts for the various respondent firms as listed below, at Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230; telephone: (202) 482-4733.

France

Edythe Artman (SNFA), George Callen (SNR), Lyn Johnson (Alfateam—Belgium, Alfa-Team—Germany, Bearing Discount—Germany, Motion Bearings—Singapore, Yoo Shin—South Korea, Rodamientos Rovi—Venezuela, Rovi-Valencia—Venezuela, Rovi-Maracay—Venezuela, RIRSA—Mexico, DCD—Northern Ireland, Euro-Latin—United Kingdom (collectively, Resellers)), David Dirstine, or Richard Rimlinger.

Germany

George Callen (Cerobear), Hermes Pinilla (INA), Thomas Schauer (Torrington Nadellager), Lyn Johnson (Resellers), David Dirstine, or Richard Rimlinger.

Italy

Lyn Johnson (Resellers) or David Dirstine.

Japan

Minoo Hatten (NSK), Thomas Schauer (NTN), Lyn Johnson (Koyo), David Dirstine, or Richard Rimlinger.

Sweden

Lyn Johnson (Resellers) or David Dirstine.

United Kingdom

Thomas Schauer (Timken, RHP/NSK), Dimitry Vladimirov (SNFA), David Dirstine, or Richard Rimlinger.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to 19 CFR Part 351 (2000).

Background

On February 5, 2001, the Department published the preliminary results of the administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom (66 FR 8931). The reviews cover 56 manufacturers/exporters. The periods of review (POR) are May 1, 1999, through April 30, 2000, for ball bearings and May 1, 1999, through December 31, 1999, for cylindrical roller bearings and spherical plain bearings. We invited interested parties to comment on our preliminary results. At the request of certain parties, we held hearings for Germany-specific issues and reseller issues for France, Germany, Sweden and Italy on March 22, 2001, and for Japan-specific issues on March 26, 2001. The Department has conducted these administrative reviews in accordance with section 751 of the Act.

Scope of the Orders

The products covered by these orders, antifriction bearings (other than tapered roller bearings), mounted or unmounted, and parts thereof, constitute the following classes or kinds of merchandise:

1. *Ball Bearings and Parts Thereof:* These products include all antifriction bearings that employ balls as the rolling element. Imports of these products are classified under the following categories: antifriction balls, ball bearings (BBs) with integral shafts, BBs (including radial BBs) and parts thereof, and housed or mounted BB units and parts thereof.

Imports of these products are classified under the following Harmonized Tariff Schedules of the United States (HTSUS) subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

2. *Cylindrical Roller Bearings, Mounted or Unmounted, and Parts Thereof:* These products include all antifriction bearings that employ cylindrical rollers as the rolling element. Imports of these products are classified under the following categories: antifriction rollers, all cylindrical roller bearings (including split cylindrical roller bearings) (CRBs) and parts thereof, and housed or mounted CRB units and parts thereof.

Imports of these products are classified under the following HTSUS subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010,

8482.40.00, 8482.50.00, 8482.80.00, 8482.91.00, 8482.99.25, 8482.99.35, 8482.99.6530, 8482.99.6560, 8482.99.70, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.93.5000, 8708.99.4000, 8708.99.4960, 8708.99.50, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

3. *Spherical Plain Bearings, Mounted and Unmounted, and Parts Thereof:* These products include all spherical plain bearings (SPBs) that employ a spherically shaped sliding element and include spherical plain rod ends.

Imports of these products are classified under the following HTSUS subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.50.10, 8483.30.80, 8483.90.30, 8485.90.00, 8708.93.5000, 8708.99.50, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

The HTSUS item numbers are provided for convenience and customs purposes. They are not determinative of the products subject to the orders. The written descriptions remain dispositive.

Size or precision grade of a bearing does not influence whether the bearing is covered by one of the orders. These orders cover all the subject bearings and parts thereof (inner race, outer race, cage, rollers, balls, seals, shields, etc.) outlined above with certain limitations. With regard to finished parts, all such parts are included in the scope of these orders. For unfinished parts, such parts are included if (1) they have been heat-treated, or (2) heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by these orders are those that will be subject to heat treatment after importation. The ultimate application of a bearing also does not influence whether the bearing is covered by the orders. Bearings designed for highly specialized applications are not excluded. Any of the subject bear-

ings, regardless of whether they may ultimately be utilized in aircraft, automobiles, or other equipment, are within the scopes of these orders.

For a listing of scope determinations which pertain to the orders, see the "Scope Determinations Memorandum" (Scope Memo) from the Antifriction Bearings Team to Laurie Parkhill, dated May 11, 2001. The Scope Memo is on file in the Central Records Unit (CRU), Main Commerce Building, Room B-099.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to these concurrent administrative reviews of the orders on antifriction bearings are addressed in the "Issues and Decision Memorandum" (Decision Memo) from Richard W. Moreland, Deputy Assistant Secretary, to Faryar Shirzad, Assistant Secretary, dated June 5, 2001, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memo, is attached to this notice as an Appendix. This Decision Memo, which is a public document, is on file in the CRU, Main Commerce Building, Room B-099, and is accessible on the Web at ia.ita.doc.gov. The paper copy and electronic version of the Decision Memo are identical in content.

Sales Below Cost in the Home Market

The Department disregarded home-market sales that failed the cost-of-production test for the following firms and classes or kinds of merchandise for these final results of reviews:

Country	Company	Subject merchandise
France	SNR	BBs
Germany	INA	CRBs
Japan	Koyo	BBs, CRBs

	NSK	BBs, CRBs
	NTN	BBs, CRBs, SPBs
United Kingdom	NSK-RHP	BBs

Partial Revocation of the Orders

In the preliminary results we stated our intent to revoke the order covering CRBs from France as it pertains to the sales of these bearings by SNFA France (66 FR at 8934). However, the order on CRBs from France was revoked on January 1, 2000, pursuant to a sunset review decision of the International Trade Commission under section 751(c) of the Act (see *Revocation of Antidumping Duty Orders on Certain Bearings From Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 FR 46267 (July 11, 2000) (*Sunset Revocation Notice*)). Therefore, there is no need for us to rule on this matter in the context of this particular review.

In addition, also in our preliminary results, we stated our intent not to revoke the order covering BBs from the United Kingdom as it pertained to sales of these bearings by SNFA U.K. However, due to a recalculation of SNFA U.K.'s margin as the result of clerical errors in our preliminary calculations (see Post-Preliminary Disclosure Memo from Laurie Parkhill to Richard Moreland, dated May 4, 2001), the final margin for SNFA U.K. is zero, and we are revoking this order in part with respect to SNFA U.K. The revocation in part applies to subject merchandise entered, or withdrawn from warehouse, for consumption on or after May 1, 2000.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made revisions that have changed the results for certain firms. We have corrected programming and clerical errors in the preliminary results, where applicable. Any alleged program-

ming or clerical errors about which we or the parties do not agree are discussed in the relevant sections of the Decision Memo, which is accessible on the Web at ia.ita.doc.gov and is on file in the CRU, Room B-099.

Final Results of Reviews

We determine that the following percentage weighted-average margins exist for the period May 1, 1999, through April 30, 2000 (for BBs), and for the period May 1, 1999, through December 31, 1999 (for CRBs and SPBs):

Company	Ball	Cylindrical	Spherical plain
France:			
SNFA	([3])	0.00	
SNR	1.64	([3])	
Alfateam	66.18	([3])	
Alfa-Team	66.18	([3])	
Bearing Discount	([2])	([3])	
Motion Bearings	66.18	([3])	
Yoo Shin	66.18	([3])	
Rodamientos Rovi	([2])	([3])	
Rovi-Valencia	([2])	([3])	
Rovi-Maracay	([2])	([2])	([3])
RIRSA	([2])	([3])	
DCD	66.18	([3])	
Euro-Latin	([2])	([3])	

Germany:			
Cerobear	0.03	0.00	(3)
INA	(1)	2.96	(1)
Torrington Nadellager	1.22	61.60	(3)
Alfateam	70.41	61.60	(3)
Alfa-Team	70.41	61.60	(3)
Bearing Discount	(2)	(2)	(3)
Motion Bearings	70.41	61.60	(3)
Yoo Shin	70.41	61.60	(3)
Rodamientos Rovi	(2)	(2)	(3)
Rovi-Valencia	(2)	(2)	(3)
Rovi-Maracay	(2)	(2)	(3)
RIRSA	(2)	(2)	(3)
DCD	70.41	61.60	(3)
Euro-Latin	(2)	(2)	(3)
Italy:			
Alfateam	68.29		
Alfa-Team	68.29		
Bearing Discount	(2)		
Motion Bearings	68.29		
Yoo Shin	68.29		

Rodamientos Rovi	(2)		
Rovi-Valencia	(2)		
Rovi-Maracay	(2)		
RIRSA	(2)		
DCD	68.29		
Euro-Latin	(2)		
Japan:			
Koyo	10.10	5.28	0.00
NSK Ltd	4.22	5.74	(3)
NTN	9.16	16.26	3.60
Sapporo	73.55	(3)	(3)
Sweden:			
Alfateam	13.55		
Alfa-Team	13.55		
Bearing Discount	(2)		
Motion Bearings	13.55		
Yoo Shin	13.55		
Rodamientos Rovi	(2)		
Rovi-Valencia	(2)		
Rovi-Maracay	(2)		
RIRSA	(2)		
DCD	13.55		

Euro-Latin	(2)
United Kingdom:	
NSK/RHP	15.65
SNFA	0.00
Timken	1.11

1 No shipments or sales subject to this review. The deposit rate remains unchanged from the last relevant segment of the proceeding in which the firm had shipments/sales.

2 No shipments or sales subject to this review. The firm has no individual rate from any segment of this proceeding.

3 No request for review under section 751(a) of the Act.

Resellers

With respect to Bearing Discount International, Euro-Latin Export Services Limited, Representaciones Industriales Rodriquez, S.A. de C.V., Rodamientos Rovi C.A., Rovi-Maracay, and Rovi-Valencia, we have determined that these respondents had no shipments during the POR. We have based our determination on letters from these respondents indicating that they had no shipments and on our examination of the Customs Service database for imports of entered merchandise involving these respondents. Based upon the record and our methodology of reviewing Customs Service information, we have determined that the respondents at issue had no shipments during the POR, and we have not established margins for use as future cash-deposit rates.

As explained in the accompanying Decision Memorandum, however, notwithstanding their letters reporting that they had made no shipments, it is impossible to establish with certainty from Customs Service data the accuracy of their statements. Therefore, we will instruct the Customs Service at the time of liquidation to review all documentation for suspended entries

of subject merchandise. If the Customs Service finds that any of the six "no-shipment" respondents in fact had shipments of subject merchandise during the POR, we will instruct the Customs Service to apply a facts-available rate to such respondents based on the adverse facts-available rate we have determined for the applicable country of origin (France, Germany, Italy, or Sweden) and subject merchandise. See Preliminary Results, 66 FR 8933, for a description of our determination of these rates.

Assessment Rates

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated, whenever possible, an exporter/importer-specific assessment rate or value for subject merchandise.

a. Export Price

With respect to export-price (EP) sales for these final results, we divided the total dumping margins (calculated as the difference between normal value (NV) and EP) for each importer/customer by the total number of units sold to that importer/customer. We will direct the Customs Service to assess the resulting per-unit dollar amount against each unit of merchandise on each of that importer's/customer's entries under the relevant order during the review period.

b. Constructed Export Price

For constructed-export-price (CEP) sales (sampled and non-sampled), we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. When an affiliated party acts as an importer for export-price sales we have included the applicable export-price sales in the assessment-rate calculation. We will direct the Customs Service to assess the resulting percentage margin against the entered customs values for the

subject merchandise on each of that importer's entries under the relevant order during the review period (see 19 CFR 351.212(a)).

Cash-Deposit Requirements

To calculate the cash-deposit rate for each respondent (i.e., each exporter and/or manufacturer included in these reviews), we divided the total dumping margins for each company by the total net value for that company's sales of merchandise during the review period subject to each order.

In order to derive a single deposit rate for each order for each respondent, we weight-averaged the EP and CEP deposit rates (using the export price and CEP, respectively, as the weighting factors). To accomplish this when we sampled CEP sales, we first calculated the total dumping margins for all CEP sales during the review period by multiplying the sample CEP margins by the ratio of total days in the review period to days in the sample weeks. We then calculated a total net value for all CEP sales during the review period by multiplying the sample CEP total net value by the same ratio. We then divided the combined total dumping margins for both export-price and CEP sales by the combined total value for both export-price and CEP sales to obtain the deposit rate.

We will direct the Customs Service to collect the resulting percentage deposit rate against the entered customs value of each of the exporter's entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. If an order has been revoked in full or in part, cash deposits will not be required on entries made after the effective date of the revocation, identified in the *Revocation* section above.

Entries of parts incorporated into finished bearings before sales to an unaffiliated customer in the United States will receive the respondent's deposit rate applicable to the order.

Furthermore, the following deposit requirements will be effective upon publication of this notice of final results of administrative reviews for all shipments of antifriction bearings entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act unless the order has been revoked in full (see *Sunset Revocation Notice*) or in part (see *Revocation* section above): (1) the cash-deposit rates for the reviewed companies will be the rates shown above except that, for firms whose weighted-average margins are less than 0.5 percent and therefore de minimis, the Department shall not require a deposit of estimated antidumping duties; (2) for previously reviewed or investigated companies not listed above, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash-deposit rate for all other manufacturers or exporters will continue to be the "All Others" rate for the relevant order made effective by the final results of review published on July 26, 1993 (see *Antifriction Bearings (Other Than Tapered Roller Bearings) and* Parts Thereof From France, et al: Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order, 58 FR 39729 (July 26, 1993), and, for BBs from Italy, see *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al: Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 61 FR 66472 (December 17, 1996)). These rates are the "All Others" rates from the relevant LTFV investigation.

These deposit requirements shall remain in effect until publication of the final results of the next administrative reviews.

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during these review periods. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these determinations and notice in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: July 5, 20002.

Faryar Shirzad,
Assistant Secretary for Import Administration.

Appendix

Comments and Responses

1. Facts Available
2. CEP Profit
3. Price Adjustments
   A. Inventory Carrying Costs
   B. Commissions
   C. Bank Charges
   D. Other Direct Selling Expenses
   E. Other
4. Resellers
5. Level of Trade
6. Arm's-Length Test
7. Prototypes and Sales Outside the Ordinary Course of Trade
8. Further Manufacturing
9. Cost of Production and Constructed Value
   A. Profit for Constructed Value
   B. Affiliated-Party Inputs
   C. When to Use CV
10. Packing and Movement Expenses
11. Miscellaneous
    A. Clerical Errors
    B. Scope
    C. Other

[FR Doc. 01-17486 Filed 7-11-01; 8:45 am]

BILLING CODE 3510-DS-P

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

05-1297, 05-1323

SNR ROULEMENTS,

Plaintiff,

and

KOYO SEIKO CO., LTD. and KOYO CORPORATION OF U.S.A.,

Plaintiffs-Appellants,

and

NSK CORPORATION, NSK BEARINGS EUROPE, LTD., and NSK LTD.,

Plaintiffs,

and

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., and NTN BOWER CORPORATION,

Plaintiffs-Appellants,

and

NTN-BCA CORPORATION,

Plaintiff,

and

INA SCHAEFFLER KG and INA USA CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee,

and

THE TORRINGTON COMPANY
(now known as Timken US Corporation),
Defendant-Appellee.

February 6, 2007, Decided
February 6, 2007, Filed

THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NON-PRECEDENTIAL OPINIONS OR ORDERS.

Before Rader, *Circuit Judge*, Archer, *Senior Circuit Judge*, and Prost, *Circuit Judge*.

ORDER

A petition for rehearing having been filed by the Appellants, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on February 13, 2007.

APPENDIX E

WORLD TRADE ORGANIZATION

WT/DS322/AB/R
9 January 2007
(07-0081)

Original: English

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

AB-2006-5

Report of the Appellate Body

* * * *

I. Introduction

1. Japan and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* (the "Panel Report").[1] The Panel was established to consider a complaint by Japan concerning the calculation of margins of dumping by the United States based on a methodology that disregards the amounts by which the export prices are above the normal value in certain transactions.[2]

* * * *

V. Zeroing As Such in Original Investigations, Periodic Reviews, and New Shipper Reviews

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[1] WT/DS322/R, 20 September 2006.

[2] See Panel Report, paras. 2.1 and 7.1. The Panel noted that, "with regard to periodic reviews and new shipper reviews, Japan challenges zeroing not only with respect to the calculation of *margins of dumping* but also with respect to the calculation of *assessment rates*." (Panel Report, footnote 630 to para. 7.1) (original emphasis).

* * * *

B. *Determination of Margins of Dumping Based on Transaction-to-Transaction Comparisons in Original Investigations*

1. Article 2.4.2 of the *Anti-Dumping Agreement*

* * * *

(c) Conclusion

137. In the light of our analysis of Article 2.4.2 of the *Anti-Dumping Agreement*, we conclude that, in establishing "margins of dumping" under the T-T comparison methodology, an investigating authority must aggregate the results of all the transaction-specific comparisons and cannot disregard the results of comparisons in which export prices are above normal value.[334]

138. Accordingly, we *reverse* the Panel's finding, in paragraphs 7.143 and 7.259(a) of the Panel Report, that the United States does not act inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of T-T comparisons in original investigations, and *find*, instead, that the United States acts inconsistently with that provision.

* * * *

C. *Zeroing As Such in Periodic Reviews and New Shipper Reviews*

* * * *

1. Articles 9.3 and 9.5 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994

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[334] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 122.

* * * *

(c) New Shipper Reviews

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166. In the light of these considerations, we *reverse* the Panel's finding, in paragraphs 7.222 and 7.259(b) of the Panel Report, that the United States does not act inconsistently with Articles 9.3 and 9.5 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews and new shipper reviews, and *find*, instead, that the United States acts inconsistently with these provisions.

* * * *

VI. Zeroing As Applied in Periodic Reviews

* * * *

176. For these reasons, we *reverse* the Panel's finding, in paragraphs 7.227 and 7.259(c) of the Panel Report, that zeroing, as applied by the United States in the 11 periodic review determinations at issue in this appeal, is not inconsistent with Articles 2.1, 2.4, 9.1, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and *find*, instead, that the United States acted inconsistently with its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

* * * *

Signed in the original in Geneva this 14th day of December 2006 by:

_____

Giorgio Sacerdoti
Presiding Member

Georges Abi-Saab Member	A.V. Ganesan Member

APPENDIX F

WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/226
26 March 2007

(07-1261)

Dispute Settlement Body
20 February 2007

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 February 2007

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

* * * *

2. United States – Measures relating to zeroing and sunset reviews

(a) Implementation of the recommendations of the DSB

* * * *

31. The representative of the *United States* said that his country recognized that anti-dumping was a complicated area and that the issue of "zeroing" was also complex. There was nothing in the WTO Agreements that mentioned or addressed "zeroing." And as the Appellate Body had made clear in the past, the best indicator of the intent of the negotiators was the text itself. However, in this dispute the Appellate Body had appeared to be trying to infer the intent of Members with respect to the issue of "zeroing" without the benefit of a textual basis. It was no surprise then that an interpretive approach, based not on agreed text but on inference, should raise a number of problems, both legal and practical.

32. The United States had provided for the convenience of Members a written explanation of its objections to the Appellate Body report.[1] For the reasons discussed at the 23 January 2007 DSB meeting and in the communication distributed at the present meeting, the United States considered that the Appellate Body's findings relating to zeroing outside the context of average-to-average comparisons in investigations were devoid of legal merit. And with regard to findings on that limited context, the United States referred Members to its past statements indicating that those findings were not beyond serious criticism.

33. Wholly apart from their legal shortcomings, the Appellate Body's findings suggested forms of implementation that simply made no sense from a policy perspective. For example, the Appellate Body had found that dumping duties might not be calculated and assessed on an import-specific basis, but must instead be calculated for all the merchandise of an exporter or producer. These findings suggested that importers of higher-priced merchandise not responsible for dumping must be penalized, either by seeing anti-dumping duties reduced for their competitors who imported the lower priced merchandise responsible for the dumping, or by themselves paying anti-dumping duties because of their competitors' conduct.

34. It was difficult to conclude that Members agreed upon such an illogical outcome. The text did not support such a conclusion, nor did the actions of the Members following the completion of the text. As was well known, all the major users of the anti-dumping instrument continued to zero following the implementation of the Anti-Dumping Agreement. Even after the Appellate Body reports on zeroing in the average-to-average context, eight of nine impartial anti-dumping experts agreed that the text did not prohibit zeroing beyond that context. Were this a municipal court result, such

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[1] Subsequently circulated in document WT/DS322/16.

an illogical outcome would be a prime candidate for reconsideration by the legislative branch. That was no less the case here, and the United States submitted that Members take up this issue, which affected the anti-dumping systems of a number of Members, in the Rules negotiations. Having said that, the United States wished to state that it intended to comply in this dispute with its WTO obligations and would be considering carefully how to do so. The United States would need a reasonable period of time.

* * * *

APPENDIX G

WORLD TRADE ORGANIZATION

WT/DS322/20
8 May 2007

(07-1900)

Original: English

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

Agreement under Article 21.3(b) of the DSU

The following communication, dated 4 May 2007, from the delegation of the United States and the delegation of Japan to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 21.3(b) of the DSU.

The Representatives of the United States of America and Japan wish to inform you that, pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), the United States and Japan have mutually agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute "*United States – Measures Relating to Zeroing and Sunset Reviews*" (WT/DS322) shall be 11 months, expiring on 24 December 2007.

In addition, we wish to inform you that, in light of our agreement, Japan no longer seeks to have the reasonable period of time determined through a binding arbitration pursuant to Article 21.3(c) of the DSU. We wish to extend our appreciation and thanks to the arbitrator for his efforts in this proceeding.

We request that you circulate this notification to the Members of the DSB.

For the United States of America

Peter F. Allgeier
Ambassador

For Japan

Ichiro Fujisaki
Ambassador

APPENDIX H

UNITED STATES – SECTION 129(c)(1) OF THE URUGUAY ROUND AGREEMENTS ACT

(WT/DS221)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 8, 2002

* * * *

I. Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or GATT 1994

* * * *

B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

10. The United States has argued at length in its first written submission, in its oral statement at the first Panel meeting, and in its answers to the Panel's questions, that section 129(c)(1) does not breach WTO rules because "prospective" implementation in WTO disputes involving antidumping and countervailing duty measures requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date of implementation. However, even if Canada were correct in arguing that date of entry is not the controlling issue, section 129(c)(1) can violate WTO rules only if it *mandates* the actions that Canada alleges. If it does not do so, then Canada's claims must fail, regardless of what it means to implement a new determination in a WTO-consistent manner.

11. It is well-established that municipal law consists not only of the provisions being examined, but also domestic

legal principles that govern the interpretation of those provisions.[8] While the Panel is not bound to accept the interpretation presented by the United States, the United States believes that the Panel should give considerable deference to the United States' views on the meaning of its own law.[9]

12. For purposes of ascertaining the meaning of section 129(c)(1) as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[10]

C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

13. Canada makes a number of arguments regarding why section 129(c)(1) allegedly breaches various provisions of the AD Agreement, the SCM Agreement, and GATT 1994. Each of the arguments is a variant on a common theme, and each arises from a common assumption. To quote Canada's response to a question from the Panel:

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[8] *See, e.g.*, Panel Report on *United States – Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

[9] *U.S. 301*, para. 7.19.

[10] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.-11); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

> The language of section 129(c)(1), by limiting compliance to future entries, has the effect of precluding the Department of Commerce from taking action to comply with the DSB ruling with respect to prior unliquidated entries. As Canada understands U.S. law, section 129(c)(1) would be interpreted this way because otherwise the express limitation to future entries contained in that section would be meaningless. The language of section 129(c)(1) precludes the Department of Commerce from applying the determination to prior unliquidated entries.
>
> Since Section 129(c)(1) directs the Department to apply a new WTO-consistent determination to all unliquidated entries entered on or after a particular date, section 129(c)(1) precludes the Department of Commerce from applying the new determination to unliquidated duties made prior to the particular date. That is, the use of the word "after" in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to prior entries. Thus, by virtue of U.S. statutory interpretation and administrative law principles, the Department is precluded from applying the new determination to prior unliquidated entries.[11]

14. Canada's assumption, however, is not correct. Canada's error arises from a mistaken interpretation of the term "determination" as that term is used in section 129(c)(1). As the United States explains below, when the term is properly understood, it becomes clear that Canada's claims and arguments do not establish that section 129(c)(1) mandates WTO-inconsistent action.

15. Section 129(c)(1) states in its entirety:

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[11] Canada's Responses to Questions, paras. 48, 49.

(c) *Effects of Determinations; Notice of Implementation.*—

(1) *Effects of determinations.*—Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

16. As the text demonstrates, the scope of section 129(c)(1) is actually quite limited. It only addresses the treatment of entries that take place on or after the date of implementation, and even then, it only addresses the application of the *particular determination issued under the authority of section 129(c)(1)* to those entries. It does not address what actions Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding (*i.e.*, any separate review of the order), and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding.[12]

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[12] Section 351.102 of Commerce's regulations defines a segment of a proceeding as follows:

17. As the United States discussed in response to question 46 from the Panel, this point can be illustrated by considering the case of a challenge to a Commerce Department final dumping determination in an investigation. If the challenge were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination.[13] It would then apply that new determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

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(1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments*. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.

(2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

[13] Section 129(c)(1) does not preclude USTR from directing implementation prior to the end of the reasonable period of time, and it does not preclude Commerce from implementing within the reasonable period of time. In both applications of section 129(c)(1) to date, USTR has directed implementation, and Commerce has implemented, before the end of the reasonable period of time. *See United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000, paras. 4, 8, 10 (explaining that USTR issued its request in the *DRAMS* case on August 2, 1999, that Commerce issued its new determination on November 4, 1999, and that the reasonable period of time expired on November 19, 1999) (Exhibit US-12); *see also* Exhibit US-9 (explaining that USTR issued its request in the *Stainless Steel* case on April 18, 2001 and that Commerce issued its new determination on August 28, 2001); *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Agreement Under Article 21.3(b) of the DSU*, WT/DS179/5, 1 May 2001 (explaining that the reasonable period of time in the *Stainless Steel* case expired on September 1, 2001) (Exhibit US-13).

18. If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review and issue a new determination. Since the administrative review determination would not be the "determination implemented under section 129(c)(1)," nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent methodologies in the administrative review.[14] Canada is simply wrong to claim that section 129(c)(1) would preclude Commerce from doing so.

19. The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.

20. Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and Commerce has not

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[14] As Canada argued in the first Panel meeting:

> [t]he law applied [in an administrative review] is the law as interpreted by the Department of Commerce *at the time that it makes its administrative review decision. The Department of Commerce's interpretation may be quite different from the interpretation it originally applied in the original investigation or in previous administrative reviews.* Examples are instances in which a U.S. court has held that the Department of Commerce's interpretation of the law is incorrect or where the Department of Commerce has decided that a different interpretation of the law is more appropriate.

See Canada's Oral Statement at the first Panel meeting, para. 11 (emphasis added).

addressed such a scenario to date. The only impact of section 129(c)(1), however, is that Commerce would not determine the fate of those pre-implementation entries *in the revocation determination itself.* Section 129(c)(1) does not require Commerce to apply duties to those entries,[15] it does not limit Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.[16] Accordingly, section 129(c)(1) does not mandate a breach of any of the provisions of the AD Agreement, the SCM Agreement, or GATT 1994 that Canada cites.

21. Since section 129(c)(1) does not mandate any particular treatment of what Canada terms "prior unliquidated entries" in any determination other than the particular one that is issued under its terms, section 129(c)(1) could *mandate* a breach of WTO rules only if the AD Agreement, the SCM Agreement, or GATT 1994 contained an affirmative obligation for Members to ensure that any implementation of adverse DSB recommendations and rulings applied to both pre- and post-implementation entries. None of the Agreements contains such an obligation; none of the Agreements even addresses what constitutes proper implementation in WTO disputes. The only agreement that *does* address a Member's implementation obligations is the DSU, and Canada has declined to pursue any DSU claims. Under the

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[15] Even the SAA states only that the entries "would remain subject to potential duty liability." SAA at 1026.

[16] In response to the Panel's questions, Canada admitted that section 129(c)(1) would *not* violate WTO rules if Commerce "change[d] its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court." *See* Canada's Responses to Questions, para. 54. It also admitted that section 129(c)(1) "would not prevent a U.S. court from directing the Department of Commerce to change the basis on which it made definitive determinations . . . ." *See id.*, para. 51.

DSU, a Member's implementation obligations are prospective only.[17]

* * * *

[17] The United States discusses below why, contrary to Canada's repeated assertions, it is in fact seeking through this dispute to establish a right of retroactive relief in cases involving antidumping and countervailing measures.